82-195 No. 82-

Supreme Court, U.S.
FILED
JUL 29 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

VAN D. MUELLER and JUNE NOYES,

Petitioners,

—vs.—

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a Minnesota Statute which provides $500 and $700 income tax deductions for parents who pay tuition for the education of children attending elementary and secondary schools, whose benefits flow overwhelmingly to parents of children attending pervasively religious nonpublic schools, and which thereby creates the "encouragement and reward" for sending children to parochial schools forbidden in Committe for Public Education v. Nyquist, 415 U.S. 756, 791 (1973), violate the Establishment Clause of the First Amendment?

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OPINIONS BELOW

The District Court Opinion is reported at 514 F. Supp. 998. The opinion of the Court of Appeals for the Eighth Circuit is unreported. See Pet. App. A-1.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) to review a judgment of the United States Court of Appeals for the Eighth Circuit entered April 30, 1982.

CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Subd. 22. Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964[1] and chapter 363. As used in this subdivision, "textbooks"

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[1] 42 U.S.C.A. § 2000c et seq.

shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

STATEMENT OF THE CASE[2]

1. Minn. Stat. § 290.09, Subd. 22 grants a deduction from gross income for those amounts paid by the taxpayer to others for tuition, textbook and transportation expenses of dependents enrolled in grades K-6 and 7-12, not to exceed $500 and $700 respectively. Certain textbook and transportation expenses are also includable in these amounts.

Insofar as tuition is concerned, no provision is made to limit the deduction to expenses incurred solely for secular instruction. Deductible textbook expenses are specifically defined to include books as well as other instructional materials and equipment

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[2]The parties are as listed in the caption.

used for teaching courses customarily taught in Minnesota's public schools, but not to include books or other materials and equipment used to inculcate religious doctrine. In practice, the textbooks and materials for which reimbursement is available will be only those books and materials not already used in the public schools, because Minnesota already requires public provision of educational aids such as textbooks, standardized tests, and pupil support services to nonpublic school students to the same extent that such aids are provided to public school students, under statutory provisions similar to those upheld in Board of Education v. Allen, 392 U.S. 236 (1968) and its progeny. See Minn. Stat. Ann. §§ 123.931 - 123.947 (West Supp. 1982). Textbook and transportation

expenses incurred in association with extra-curricular activities are not deductible.

Despite the apparent formal neutrality and facial breadth of the class benefited by the statute's terms, the record makes clear that the benefits actually flowing to public school children and their parents are extremely minimal. Insofar as the tuition deduction is concerned, which the Court of Appeals agreed was the principal benefit provided by the statute, public schools in the State of Minnesota do not generally charge tuition. The record discloses that for the school year 1978-1979, out of 805,155 public elementary and secondary school students, only 79 students paid tuition for

attendance at Minnesota public schools. See Defendants' Supplemental Response to Plaintiffs' Request for Admission, and Affidavit of James A. Lee, Jr. During 1977-1978, only 40 students paid for public school instruction. See Affidavit of James A. Lee, Jr.

By contrast, the number of school children attending tuition-charging nonpublic schools in Minnesota during the 1979-1980 school year was 90,954. Of these, 86,808 (95.44%) attended schools considering themselves to be sectarian. For the 1978-1979 school year, 88,524 students attended nonpublic elementary and secondary schools. Of this number, 85,243 (96.29%) attended sectarian schools. See Affidavit of Michael J. Lovett, and Defendants' Supplemental

Response to Plaintiffs' Request for Admission, respectively.

Some public school students are charged certain other fees for specialized instruction services, including driver's educaion. Minn. Stat. Ann. § 120.73 (West Supp. 1982). Records of the State Department of Education indicate that their Account Code 1-10.21, which includes monies received by public school districts for tuition and non-academic charges including driver's education, during the 1978-1979 school year, totalled $2,005,142. See Affidavit of Ronald Moir. Minnesota authorities have denied that they have any records which would detail the portion of this amount collected for extra-curricular activities, or the

portion of this amount for which taxpayers claim deductions.[3]

Fees charged by public schools for items categorized as textbook and transportation expenses are reported in Account Code 1-10.38 Id. The $907,204 reported therein reflect those limited charges which public school districts may charge pupils under law. Minn. Stat. Ann. § 120.71-120.76 (1980). Not all these expenses are deductible under the challenged statute; and again, the state

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[3] As the record below and the lower court decisions indicate, Minnesota has implemented the tuition tax deduction program in such a way as to ensure the absence of any meaningfully detailed information regarding the actual amounts of income deducted, actual tax loss to the state, and the extent to which deductions were taken for tuition for pervasively religious instruction. In our view, that failure has a significant bearing on the judgment below. See fn. 7 infra.

has no records from which to ascertain what proportion of these expenses are deducted.

Revenue loss to the State of Minnesota as a result of the challenged statute was estimated annually at $2.4 million.[4] See Defendants' Response to Plaintiff's Request for Admission and Interrogatories.

2. This action was commenced in the United States District Court for the District of Minnesota in June, 1980, by five Minnesota taxpayers, three of them of whom were subsequently dismissed as plaintiffs. Pet. App. A-56-57. Jurisdiction of the Court was invoked

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[4]Taxpayers availing themselves of Minnesota's "standard deduction" are not currently permitted to make use of the deduction. Minn. Stat. Ann. § 290.09, Subd. 15. (West. Supp. 1982).

pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202, and 42 U.S.C. § 1983. The District Court granted defendants' motion for summary judgment and dismissed the complaint by Order of May 13, 1981.

On appeal to the United States Court of Appeals for the Eighth Circuit, the district court's judgment was affirmed. Writing for the panel, Judge Lay conceded that the statute before it was "identical" to a statute struck down by the First Circuit in Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980), and that the overall proofs were nearly so. The Eighth Circuit nevertheless disagreed with the First Circuit's judgment in Norberg that a tuition tax deduction for elementary and secondary education whose benefits flow in substantial measure to

the tiny proportion of students in religious schools is not rendered constitutional by a formalistic inclusion of various other expenses paid by public school students. The conflict, the court indicated, would have to be resolved by this Court. Pet. App. A-29. Addressing itself principally to the tuition deduction, the Eighth Circuit held that the tuition tax deduction did not have a primary effect of advancing religion because the statute was "neutral on its face" (Pet. App. A-44), and did not expressly "singl[e] out a class of citizens for special economic benefit". Pet. App. A-43. The court also found it relevant that whereas in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) the tax benefit received by each parent of a parochial school child was an arbitrary definite amount, the benefit in

Minnesota was "more diffused and less certain", since only taxpayers who move from a higher bracket to a lower one as a result of the tax deductions are actually benefited.

REASONS FOR GRANTING THE WRIT

This case concerns another of the "ingenious plans for channeling state aid to sectarian schools that periodically reach this Court . . ." Committee for Public Education v. Nyquist, 413 U.S. at 785. In a series of cases rejecting increasingly sophisticated but equally unconstitutional attempts to funnel public tax monies to sectarian schools, this Court has steadfastly held that substantial aid to the educational function of pervasively religious elementary and secondary schools necessarily aids the sectarian school enterprise as a whole, and thereby violates the First Amendment's Establishment Clause.

This Court's judgments have not depended on the form public tax

support for religious education has taken. Instead, the Court has looked to the effect of the aid, regardless of whether it has been provided in the form of teacher salary supplements, Lemon v. Kurtzman 403 U.S. 602 (1971), flat tuition reimbursements to parents, grants to schools for maintenance and repair or tuition tax deductions, Committee for Public Education v. Nyquist, supra, the provision of auxiliary educational services to students or the loans of instructional materials and equipment to schools, Meek v. Pittenger, 421 U.S. 349 (1975), or the loan of such materials to parents, Wolman v. Walter, 433 U.S. 229 (1977). Where that effect is to "relieve [parents of] their financial burdens sufficiently to assure that they continue to have the option to send their children

to religion-oriented schools", Committee for Public Education v. Nyquist, 413 U.S. at 783, state aid programs have been struck down as unconstitutionally aiding religion, despite the "unexceptionable" purposes for which such aid has been enacted. Id. The decision below conflicts with each of those decisions and cannot be reconciled with this Court's Establishment Clause jurisprudence. A writ of certiorari should be granted to resolve that conflict.

The decision below also conflicts squarely with a recent First Circuit decision striking down on nearly identical facts a tax deduction scheme identical to that upheld below. Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980). Unlike the

First Circuit's decision in Norberg, which was faithful to this Court's Establishment Clause cases, the Eighth Circuit's judgment upholding tuition tax credits can only be viewed as an open invitation to this Court to abandon the clearly demarcated (if not analytically tidy) lines between the permitted and the forbidden that have emerged and prevailed since this Court's first exploration of this ground in Everson v. Board of Education, 330 U.S. 1 (1947).

Few cases present this Court with questions as obviously worthy of certiorari as this. Whether "a charge [can be] made upon the state for the purpose of religious education" (Committee for Public Education v. Nyquist, 413 U.S. at 791 (citation omitted)) is a question that has occupied

this Court's attention for more than three decades. But as this case makes clear, repeated assertions that the state may neither encourage nor reward parents who send their children to sectarian schools, and may not reduce the costs of such education by creative provision of tax funds, have not had the intended effect. Certiorari is required to enforce obedience to law settled by this Court.

I. THERE IS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL.

The decision rendered by the Eighth Circuit below directly conflicts with the decision of the First Circuit in Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980). As the Eighth Circuit recognized:

> [O]ur analysis places us in apparent disagreement with Norberg. We find

> the issue before us significant, not only to the State of Minnesota but to the Nation. Eventually, if not within the parameters of this case, the Supreme Court must decide whether statutes such as those in Rhode Island and Minnesota can survive constitutional scrutiny. Pet. App. 58-58.

The decision below is also in clear conflict with the Third Circuit's decision in Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3rd Cir.), aff'd mem. 442 U.S. 907 (1979), notwithstanding the Eighth Circuit's attempt to distinguish Byrne on the ground that the Minnesota tuition tax deduction (unlike the New Jersey tuition tax deduction) extends on its face to public school tuition payments.

In all three cases, state statutes were enacted encouraging and supporting parents to send their children to private, sectarian schools by providing

fixed and substantial tax deductions for tuition actually paid out and certain other expenses. Each statute was defended on the ground that tax exemptions were theoretically available not only to students attending sectarian schools, but to others as well.[5] Two out of the three challenged statutes, but not the statute at issue here, were struck down on the ground that the "true color of the tuition deduction" is shown

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[5]In Minnesota, as in Rhode Island, the benefits theoretically extended to parents paying public school tuition, although in fact such parents represent an extremely small proportion of parents with school-age children. New Jersey attempted to defend its statute by pointing to deductions available both to parents of children attending non-sectarian private schools, and to parents paying tuition to public and private universities, and to a variety of other deductions available in situations where taxpayers were likely to incur "added expenses". 590 F.2d at 519.

by its disproportionate encouragement of parents to send their dependents to religious schools, a forbidden primary effect under the Establishment Clause. Norberg, 630 F.2d at 859; Byrne, 590 F.2d at 518.

As this Court is well aware, the political pressure in many states and in Congress to aid parents of children attending sectarian schools is endemic. A new scheme enacted in one jurisdiction is quickly adopted in others. The Eighth Circuit's decision upholding tuition tax credits will quickly lead to a rash of similar new statutes; the First and Third Circuits' decisions will just as surely be relied on in the litigation which will swiftly and surely be brought to prevent such statutes from taking effect. The issues presented in resolving the conflict

this case squarely presents have now been fully ventilated in three courts of appeals. (Indeed, as we argue infra, we believe that they have been resolved by this Court.) Further lower court challenges will not aid this Court's resolution of the issues. Certiorari is warranted, now, to resolve the pressing conflict.

II. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT

This Court has twice struck down state statutes providing parents sending children to sectarian schools with tax benefits constitutionally indistinguishable from those upheld below by the Eighth Circuit. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Byrne v. Public Funds for Public Schools, 442 U.S. 907 (1979), aff'g

Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3rd Cir. 1979). Certiorari should issue to correct the Eighth Circuit's misapprehension of governing law.

In Committee for Public Education v. Nyquist, this Court applied its three-pronged test under the Establishment Clause developed in Lemon v. Kurtzman, 403 U.S. 602 (1971), to a New York statute which inter alia provided financial benefits in the form of a deduction from taxable income to parents of children attending nonpublic schools in the state. 413 U.S. at 789-798. The Court struck down the tuition tax deduction program, holding:

> [I]nsofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

413 U.S. at 793. That holding was apparently followed in 1979 when this Court summarily affirmed a decision of the Third Circuit striking down another variant of a tuition deduction plan for parents of children in elementary and secondary schools. Byrne v. Public Funds for Public Schools, supra. See also Sloan v. Lemon, 413 U.S. 825 (1973) (tuition reimbursement).

The clear conflict between Nyquist and Byrne, on the one hand, and this case, on the other, cannot be avoided by relying on the meritless distinctions that the Eighth Circuit attempted to draw. The Eighth Circuit attempted to distinguish this case on the ground that the class benefited included more than parents of children in sectarian school. But the fact that substantial numbers of

parents of children attending nonsectarian schools entirely secular in character also benefited under the statute did not deter this Court from holding in Nyquist that the primary effect of the statute was to advance religion. To the contrary, although the Nyquist court observed that the tax benefits it struck down were not available to parents of public and private school children in comparable amounts, it reached its decision without reliance on this factor, which was addressed as merely providing additional support for the Court's holding. See 413 U.S. at 782 n.38, 793-94.

Moreover, even assuming arguendo that the breadth of the class affected was the controlling factor in Nyquist and Byrne, the ostensible breadth of the class of

beneficiaries under Minnesota's law is illusory. Although § 290.09 permits deduction of expenses incurred by parents of children in public schools as well as nonpublic schools, the record demonstrates that the overwhelming proportion of taxpayers allowed deductions, and the overwhelming proportion of income deductible under the statute, qualify by reason of expenditures directly related to religious education. By calculating the greatest portion of revenue loss which could be attributed to deductions taken by parents of children attending nonsectarian schools (public or nonpublic-nonsectarian), petitioners demonstrated to the courts below that, at its theoretically broadest scope, only 29% of the dollar benefit afforded under the

challenged statute can possibly be associated with expenses for nonsectarian education.[6] For the 1978-1979 school

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[6]Although the record plainly establishes that at least 71% of the dollar benefits available under the statute flow to the relatively small number of parents whose children attend sectarian schools, a proportion petitioners believe amply supports their conclusion that the challenged statute must be struck down under Nyquist and Byrne, in practice, the actual figure is probably much higher. See Brief for Appellants with the Eighth Circuit at 11. The absence of more exact evidence is wholly attributable to the state, which has designed the program and the tax forms implementing it in such a way as to make more specific evidence impossible to collect without individualized discovery of millions of taxpayers, an obvious impossibility. Under these circumstances, as plaintiffs urged in the Court of Appeals, if summary judgment striking down the statute was judged impossible absent further evidentiary materials concerning the actual incidence of tax benefits, the case should have been remanded with the burden of producing additional data shifted to the State, which alone is in a position to compile it by amending the tax forms to require line itemization of

year, the approximately 820,000 students in both public and nonsectarian private schools claimed a maximum of $5.2 million in deductions, an average of $6.35. On the other hand, the approximately 85,000 students attending religiously affiliated schools deducted a minimum total of

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6 (continued)

deductions taken on the challenged statute. The approach taken by the Court of Appeals--essentially to presume accrual of the statute's benefits to all state taxpayers in the absence of firmer evidence than presently can be compiled from the state's records -- prevents analysis of the challenged statute beyond its face, an approach patently inconsistent with the more penetrating analysis required by this Court's Establishment Clause jurisprudence. See, e.g., Committee for Public Education v. Nyquist, Supra; Wheeler v. Barrera, 417 U.S. 402 (1974).

[7]The Court of Appeals was uncertain as to the source of this figure. Pet. App. A-16. The figure comes from Defendant's Supplemental Response to Plaintiff's Request for Admissions and Affidavit of Michael J. Lovett.

approximately $12,568,731.00, an average deduction of $147.81. This represents a ratio of 23:1.

The Court of Appeals' reliance on the facial breadth of the benefited class fares no better when attention is focused on discrete items for which deductions may be taken.

Insofar as tuition is concerned, in light of the fact that school year tuition was paid only by 79 and 40 public school students in 1978 and 1979 respectively, see supra at 3-4, any suggestion that the tuition deduction affects a broad class is simply untenable.

In analyzing transportation expenses, the Court of Appeals relied on the permissible nature of public aid under the Everson v. Board of Education, 330 U.S. 1 (1947), neglecting the fact that

transportation to and from school in Minnesota is already granted by separate statute on an equal basis to students in both public and private schools. Minn. Stat. §§ 123.78-123.80. Therefore, transportation expenses deducted under the challenged statute must be for services beyond those provided to students in public schools. Under the controlling authority of Wolman v. Walter, 433 U.S. 229, 252-255 (1977), such expenses would appear to be plainly forbidden, especially in light of the total absence of any provision for supervision by public authorities. 433 U.S. at 254. In regard to textbooks, even the Court of Appeals was troubled by the fact that textbooks were already given to the students in sectarian private schools in statutes analogous

to those previously reviewed by this Court. Therefore, textbook expenses deducted under the challenged statute must be for textbooks beyond those provided to students in public schools, aid which transgresses the limitations of Board of Education v. Allen, 392 U.S. 236 (1968) as reaffirmed in Wolman v. Walter, 433 U.S. at 236-238, 251 n.18. In short, the Court of Appeals' focus on the surface configuration of the statute, which purports to grant broad relief to all Minnesota taxpayers with children enrolled in schools and not primarily to those with children attending sectarian private schools, is contrary to Nyquist and without substance or merit.

Nor does the Eighth Circuit's attempt to rely on Walz v. Tax Commission, 397 U.S. 664 (1970) disguise the sharp

conflict between this case and Nyquist. The Nyquist court considered and rejected precisely those arguments based on Walz relied on below. Insofar as it had rested on longstanding historical usage Walz was found inapposite in Nyquist because

> it seems clear that tax benefits for parents whose children attend parochial schools are a recent innovation, occasioned by the growing financial plight of such nonpublic institutions and designed, albeit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of this Court.

413 U.S. at 792. Insofar as the property tax exemption in Walz served not "to support or to subsidize, but . . . to minimize involvement and entanglement," 413 U.S. at 793, it was also found inapposite, since the Court has insisted that states may not assume that publicly-supported sectarian teachers will refrain

from inculcating religious beliefs and that they affirmatively police the secularity of their grants. See Nyquist, 413 U.S. at 778 & n.35. Notably, the Minnesota statute challenged here does not provide for that required supervision. In addition to these distinctions, which the Nyquist court found dispositive and which make Walz inapposite here, Nyquist emphasized Walz's inapplicability to school aid legislation by pointing out that school aid programs, unlike the property tax exemption upheld in Walz, require annual appropriations carrying a great danger of political entanglement and religious strife along sectarian lines. 413 U.S. at 794-798.[8]

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[8]That recurring danger is exemplified by a bill in the Minnesota

Finally, the Court of Appeals also attempted to justify the tuition tax deduction scheme on the ground that it was a "genuine tax deduction". Pet. App. A-39. That attempted justification is unavailing. Although as the Court of Appeals observed Nyquist reserved the question whether a "genuine tax deduction, such as for charitable contributions . . . is constitutionally acceptable under the 'neutrality' test in Walz", 413 U.S. at 790 n.49, the Minnesota deductions share precisely the characteristics of the deduction plan struck down in Nyquist, and none of those which might be considered analogous to

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8 (continued)

Legislature that would double the deductions currently available. HF 242, 1981-82 Sess.

charitable contributions. Like the deductions invalidated in Nyquist, those available in Minnesota are not measured by actual expenses, but instead are generally a fixed amount provided in the statute. See 413 U.S. at 790. Similarly, the Minnesota deductions, like the New York deductions in Nyquist, are "unrelated to, and not reduced by any deductions to which [the taxpayer] may be entitled for charitable contributions to religious institutuions." Id. Most importantly, unlike genuine charitable contributions, the payments for which both New York and Minnesota attempted to permit deductions represent services purchased, which have never been deductible because a payment for which the contributor derives a direct and equivalent benefit is not a charitable

contribution at all. Taxpayers are free under Nyquist and Walz to make genuine charitable contributions to religious institutions and to take charitable deductions if they so choose; but the expense of sending a child to a parochial school is no more a "charitable contribution" than is tuition paid to Harvard University.

By relying on a surface neutrality that is belied by the facts, and by engaging in the transparent ipse dixit of labeling tuition paid for parochial school a "charitable contribution" entitled to constitutionally valid tax deductions under the limited neutrality test of Walz, the Eighth Circuit has decided this case in a manner directly conflicting with this Court's decisions

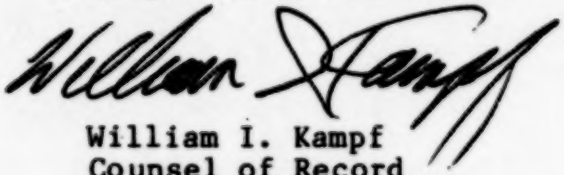
in Nyquist and Byrne. Certiorari should issue to resolve that conflict.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, and either summarily reverse or set the case for full argument. In the alternative, if for reasons set forth, supra, at fn.6, the Court concludes that the record provides insufficient evidence on which to adjudicate the constitutionality of the challenged statute as a result of the inadequate statistics maintained by defendants, certiorari should be granted, the judgment below vacated, and the case remanded with instructions to require

defendants to compile statistics to augment the record.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1569

Van D. Mueller, et al,	*	
	*	Appeal from the
	*	United States
Appellants,	*	District Court
	*	for the District
v.	*	of Minnesota
	*	
Clyde E. Allen, Jr., et al,	*	
	*	
	*	
Appellees.	*	

Submitted: December 15, 1981
Filed: April 30, 1982

Before LAY, Chief Judge, HENLEY and ARNOLD, Circuit Judges.

LAY, Chief Judge.

Minnesota Statute § 290.09, subdivision 22, authorizes a limited income tax deduction to Minnesota taxpayers for certain school-related expenses incurred on behalf of

dependents. The plaintiffs-taxpayers in this action claim that the statute advances an establishment of religion and restrains free exercise of religion in violation of the first and fourteenth amendments of the United States Constitution. The district court granted the Commissioner's and intervening taxpayers' motions for summary judgment and held that the statute is "neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion." Mueller v. Allen, 514 F. Supp. 998, 1003 (D. Minn. 1981).[1] This appeal

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[1]In an earlier suit the same statute withstood a similar constitutional attack before a three-judge court. M.C.L.U. v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978) (Alsop, J., dissenting). The district court ruled that this judgment was res judicata

followed. We affirm the the judgment of the district court.

Facts.

Section 290.09, subdivision 22,[2] authorizes a deduction to gross income

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1 (continued)
as to certain individual plaintiffs who were plaintiffs in the original action. Mueller v. Allen, 514 F. Supp. 998, 999 (D. Minn. 1981).

[2]Section 290.09, subdivision 22, provides for the following deduction from gross income in computing net income:

> Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which

for tuition, textbook, and transportation expenses incurred on behalf of dependents

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2 (continued)

> adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

Minn. Stat. Ann. § 290.09, subd. 22 (West Supp. 1982).

The law providing deductions for tuition and transportation expenses was originally enacted in 1955 and later revised in 1976 and 1978.

attending elementary or secondary schools. The deduction is limited to actual expenses incurred up to a $500 maximum per dependent in grades K to 6 and a $700 maximum per dependent in grades 7 to 12. Deductible expenses under subdivision 22 are restricted to those incurred in conjunction with schools which, inter alia, enable a Minnesota resident to fulfill state compulsory attendance laws. This restriction apparently encompasses public and nonpublic, secular and sectarian, educational institutions.

The district court found deductible tuition expenses to include:

1. Tuition in the ordinary sense.

2. Tuition to public school students who attend public schools outside their residence school districts.

3. Certain summer school tuition.

4. Tuition charged by a school for slow learner private tutoring services.

5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school.

6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school.

7. Montessori School tuition for grades k through 12.

8. Tuition for driver education when it is part of the school curriculum.

514 F. Supp. at 1000.[3]

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[3]The court below further determined that deductible transportation expenses included:

> [T]he cost of transporting students in school districts that do not provide free transportation, the cost of transporting students who live in one district but attend school in another, and the cost of transporting

The statute itself restricts deductible textbook expenses by excluding expenditures for books for courses not legally and commonly taught in public schools, books whose purpose is to teach or inculcate religious tenets, doctrines or worship, and books or materials for certain extracurricular activities[4].

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3 (continued)

students who attend school in their residence district but who do not qualify for free transportation because of proximity to their schools of attendance. 514 F. Supp. at 1000.

[4]The district court found that textbook deductions include not only secular textbooks subject to these restrictions, but also certain requisite equipment, including:

1. Cost of tennis shoes and sweatsuits for physical education.

2. Camera rental fees paid to the school for photography classes.

3. Ice skates rental fee paid to

The district court found that subdivision 22 operates as a true tax "deduction," as opposed to a "credit." The taxpayer realizes a tax benefit only in the event that the resulting decrease in net taxable income places the taxpayer

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4 (continued)
the school.

4. Rental fee paid to the school for calculators for mathematics classes.

5. Costs of home economics materials needed to meet minimum requirements.

6. Costs of special metal or wood needed to meet minimum requirements of shop classes.

7. Costs of supplies needed to meet minimum requirements of art classes.

8. Rental fees paid to the school for musical instruments.

9. Cost of pencils and special notebooks required for class.

514 F. Supp. at 1000.

in a lower tax bracket. 514 F. Supp. at 1000.

Plaintiffs contend that statistical evidence allegedly demonstrates that an overwhelming majority of taxpayers who utilize the deduction authorized by Minn. Stat. § 290.09, subd. 22, have dependents attending parochial schools; thus, it is urged that the statute has the primary effect of supporting and advancing religion in violation of the Establishment clause of the first amendment. Plaintiffs also argue that the statute does not have a valid secular purpose and that it fosters an impermissible entanglement between church and state.

Analysis.

The first amendment states in part that "Congress shall make no law

respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const., amend. I.[5] Despite the apparent absolute prohibition contained in the Establishment and Free Exercise Clauses, a strict policy of total separation of church and state has been neither advocated nor enforced in this nation. As Justice Powell observed, existing standards do not necessarily afford "bright line" guidance. Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 760-61 (1973).

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[5]This mandate is made applicable to the states by the Due Process Clause of the fourteenth amendment. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

Without repeating the history of the Establishment Clause,[6] we note that, although a law may be one respecting the establishment of religion while aiding all religions equally and without promoting a state religion, See Everson v. Board of Education, 330 U.S. 1, 15 (1947), a law that indirectly benefits religion or religious institutions is not invalid per se on those grounds. See,

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[6]See Everson v. Board of Education, 330 U.S. 1, 8-16 (1947) (Black, J.), 28, 28-41 (Rutledge, J., dissenting), for a discussion of the history of the Establishment Clause. See also L. Tribe, American Constitutional Law 813-19 (1978). For the developments in this area involving religion and education, see, e.g., Giannella, Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement, 1971 S.Ct. Rev. 147 (1971); Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 81 Harv. L. Rev. 513 (1968); Morgan, The Establishment Clause and Sectarian Schools: A Final Installment?, 1973 S.Ct. Rev. 57 (1973).

e.g., Wolman v. Walter, 433 U.S. 229 (1977) (law providing loan of textbooks purchased with state funds and provision of diagnostic services to nonpublic schools upheld); Hunt v. McNair, 413 U.S.734 (1973) (law providing aid to church colleges through revenue bonds for construction upheld); Tilton v. Richardson, 403 U.S. 672 (1971) (law providing grants to church colleges for construction of buildings used for secular purposes upheld); Walz v. Tax Commission, 397 U.S. 664 (1970) (law providing real estate tax exemptions to churches upheld); Board of Education v. Allen, 392 U.S. 236 (1968) (law providing for loan of state textbooks to nonpublic schools upheld). See also Widmar v. Vincent, 50 U.S.L.W. 4062 (U.S. Dec. 8, 1981) (Establishment Clause does not

preclude use of state university facilities by registered student religious organization).

Much of the recurring case law in this area has evolved around the troublesome relationship between religion and education, see Nyquist, 413 U.S. at 772, and, while seemingly inconsistent, has developed into a three-part test. In order to pass constitutional muster, a statute which allegedly violates the Establishment Clause must, first, have a secular legislative purpose; second, have a principal or primary effect that neither advances nor inhibits religion; and third, not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

Plaintiffs allege that Minn. Stat. §

290.09, subd. 22, does not satisfy the secular purpose requirement of Lemon v. Kurtzman.[7] The gist of plaintiffs' argument is that the preeminent purpose of the statute must necessarily be to aid religion because statistics show that the overwhelming effect of the statute is to aid taxpayers with dependents in sectarian schools. Cf. Stone v. Graham, 449 U.S. 39, 41 (1980) (preeminent purpose of Kentucky statute requiring posting Ten Commandments in public schools classrooms is religious notwithstanding avowed secular purpose). Defendants urge that plaintiffs are "boot strapping" their "secular purpose" attack with the "primary effects" prong of their

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[7]This issue was raised at trial evidently to preserve the right of appeal, but no supporting evidence was proffered at that time.

argument, and that a statute may violate the Establishment Clause and still have a valid secular purpose. See Meek v. Pittenger, 421 U.S. 349, 363 (1975); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973). Defendants further urge that section 290.09, subd. 22, has the valid secular purpose of seeking to assist Minnesota taxpayers in providing dependents with a safe, effective and diverse educational environment. Cf. Wolman v. Walter, 433 U.S. 229, 236 (1977) (purpose of Ohio statute authorizing funding for use of nonpublic school children for, inter alia, purchase of secular textbooks was to reflect state's "legitimate interest in protecting the health of its youth and in providing a fertile educational

environment for all the schoolchildren of the State").

The district court found no indicia of an invalid nonsecular purpose of Minn. Stat. § 290.09, subd. 22, 514 F. Supp. at 1001. We concur. The manifest purpose of the challenged statute is to provide all taxpayers a benefit which will operate to enhance the quality of education in both public and private schools.

Plaintiffs focus their constitutional challenge on the "primary effect" of the tuition portion of the statute.[8] At trial they relied upon statistical

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[8]Plaintiffs urge that the effects of the transportation and textbooks deductions are de minimis and do not direct the primary effects portion of their argument at these components of the statute. As the court in M.C.L.U. v. Roemer, 452 F. Supp. 1316 (D. Minn.

calculations based upon data provided by the Minnesota Department of Education indicating that of the 90,954 pupils who attended nonpublic schools in 1979-80,[9]

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8 (continued)

1978), stated:

> [S]ince the state can provide textbooks, Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), and transportation, Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), for parochial school students without offending the Establishment Clause, the statutory deduction for parental expenditures to purchase these items is constitutionally proper.

452 F. Supp. at 1318-19.

Defendants submit that, although the textbook and transportation components are constitutional, their effects are substantial with regard to the statistical evidence involving breadth of affected class.

[9]Plaintiffs inform us in their brief that approximately 820,000 pupils attend public and nonpublic-nonsectarian schools in Minnesota. The record is silent as to this figure.

4.56% attended purportedly nonsectarian schools. During 1978-79, 3.71% of the 88,524 pupils in nonpublic schools attended nonsectarian schools. Plaintiffs urge here that the State loses over 2.4 million dollars in revenue from this deduction and that 71% of this amount is due to benefits given to parents with dependent children in sectarian schools. Plaintiffs assert that these facts, coupled with the fact that Minnesota public schools are tuition-free to most residents, show that the overwhelming percentage of tax relief granted under the statute is for tuition expenditures for religiously-affiliated education. Therefore, it is argued that the primary effect of the statute is the support and advancement of religion, thus falling within the purview of Committee

for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3d Cir.), aff'd mem., 442 U.S. 907 (1979); and Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980).

Defendants oppose this argument on both factual and legal grounds. Plaintiffs' statistical evidence is challenged on the grounds that it fails to account for tax benefits running to taxpayers with dependents in public and nonsectarian private schools with ordinary tuition expenses, with textbooks and transportation expenses, and with summer school and driver's education class tuition expenses. The district court found that plaintiffs' statistical argument contained "omissions of serious

significance" and held that the benefited class under Minn. Stat. § 290.09, subd. 22, was sufficiently broad that the primary effect did not serve to promote or inhibit religion. 514 F. Supp. at 1002-03.

Defendants also claim that a de jure, not a de facto, analysis is the proper test in ascertaining the breadth of the benefited class. Defendants submit that the Supreme Court has adopted the de facto approach urged by plaintiffs only when confronted with a statute that does not extend its benefits to a broad class of beneficiaries. Compare Walz v. Tax Commission, 397 U.S. 664 (1970); Board of Education v. Allen, 392 U.S. 236 (1968); and Everson v. Board of Education, 330 U.S. 1 (1947) (broad class) with Committee for Public Education & Liberty

v. Nyquist, 413 U.S. 756 (1973); and Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3d Cir.), aff'd mem., 442 U.S. 907 (1979) (narrow class).

Defendants urge that Minn. Stat. § 290.09, subd. 22, is a general welfare measure, that any benefits flowing to religious schools by way of possible incentive to taxpayers to send their dependents to private school are both remote and incidental, that the primary benefit is to individual parents and students, and that such a tuition and transportation deduction has been authorized since 1955. These factors, it is argued, when viewed in light of the breadth of the affected class of beneficiaries, precipitate toward a finding of neutrality.

Plaintiffs rely upon Committee for

Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). In Nyquist, the Supreme Court found unconstitutional a New York tax statute which authorized taxpayers with children attending nonpublic elementary and secondary schools to "deduct" a stipulated amount from adjusted gross income. Because the amount of the deduction was predicated on and graduated according to the taxpayer's income, not actual tuition expenses incurred, the Court observed that the "deduction" operated more as a hybrid tax "credit." 413 U.S. at 789. However, the Court's decision did not turn on this technical label, and a decision as to the constitutionality of a genuine tax deduction was specifically reserved. 413 U.S. at 789, 790 n.49. The Nyquist Court

characterized the arbitrary deductions as a type of "'forgiveness' in exchange for performing a specific act which the State desires to encourage," 413 U.S. at 789, and described the encouraged act as "sending [his] children to nonpublic schools.' 413 U.S. at 791. These factors, plus the fact that the "deduction" was limited to the narrow class of nonpublic schools, were of primary importance to the Nyquist Court. 413 U.S. at 794.[10]

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[10]The court in Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3d Cir.), aff'd mem. 442 U.S. 907 (1979), relied heavily on Nyquist in holding unconstitutional a new Jersey law providing a $1,000 tax exemption per dependent attending nonpublic schools only. The narrowness of the class and the arbitrariness of the tax relief were emphasized by the court.

Since the three-judge decision in M.C.L.U. v. Roemer, the First Circuit in Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980), held unconstitutional a Rhode Island tax statute which was nearly identical to the challenged Minnesota statute. The Norberg court found that, although a deduction was available to taxpayers with dependents attending public and nonpublic schools, 94% of students attending nonpublic and tuition-funded public schools attended sectarian schools. 630 F.2d at 859. The Norberg court distinguished the Roemer decision on the grounds that the exact nature of the benefited class in Roemer never became known since the parents had stipulated that only "some" students whose parents

were eligible for the tax benefit attended sectarian schools.[11] The First Circuit concluded that

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[11] Norberg's distinction of Roemer is somewhat dubious. The stipulation in Roemer was deemed relevant only in conjunction with the textbook and transportation deductions. In discussing the textbook deduction in Roemer Judge Devitt observed:

> [T]he stipulation of facts recites only that some taxpayers who claim the deduction have dependents who attend parochial schools. Stipulation, ¶ 8. Thus, the facts presented do not indicate that this facially neutral statute is being employed to primarily benefit parochial school students. Unlike the enactment challenged in Marburger, this statute ". . . merely makes available to all children the benefits of a general program . . ." Board of Education v. Allen, 88 S.Ct. at 1926. Of course, this analysis only extends to plaintiffs' concessions with respect to textbooks and transportation. Facial neutrality is not controlling with respect to the forbidden forms of aid.

M.C.L.U. v. Roemer, 452 F. Supp. 1316, 1319 n.2 (D. Minn. 1978).

the evidence in Norberg showed that the overwhelming majority of the parents eligible for the tuition deduction send their children to sectarian schools. 630 F.2d at 861.

The district court in Norberg also found that the fact that the Rhode Island statute included a deduction for "'other instructional materials and equipment' in addition to books [made] the likelihood of entanglement even greater . . . because the government would not only have to supervise the parents' purchases, but it would have to supervise the parochial schools themselves to ensure that the 'instructional materials' were not to be used in the course of religious instruction." Rhode Island Federation of Teachers v. Norberg, 479 F. Supp. 1364,

1372 (D. R.I. 1979). On appeal this decision was affirmed.[12]

We find that the constitutional issues present under the Minnesota

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[12]On appeal the First Circuit observed:

> The difficulty with this provision is not that the secular nature of the textbooks and instructional material for which deductions must be taken could not be guaranteed; it is that the involvement of church and state necessary to guarantee that result would excessively entangle church and state. See generally Surinach v. Pesquera de Busquets. 604 F.2d 73 (1st Cir. 1979). The district court correctly distinguished this case from those in which the state determines in advance of the purchase the secular nature of texts and instructional materials. We agree that continuing surveillance would be necessary to ensure that equipment which can be used for both secular and sectarian purposes, such as tape recorders and projectors, are used only for secular purposes.

Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855, 862 (1st Cir. 1980).

statute require more than facile solution; obviously the First Circuit's conflicting analysis in Norberg is cause for grave concern. The challenged statutes in both cases are identical; the overall proofs are almost identical and similarly uninformative.[13]

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[13]In this regard both cases develop little more than proofs of the percentage of parents who send their children to sectarian schools as related to all "eligible" parents who send their children to nonpublic schools. As the district court observed:

> [P]laintiffs project that at its theoretically broadest scope 14-18% of the taxpayers qualifying for a tuition deduction under the challenged statute do so by reason of expenses related to nonsectarian schooling. Defendants contend, however, that plaintiffs have incorrectly assumed that only full-time tuition payments are relevant and have ignored such items as tuition for summer school and for certain other courses such as driver's education that are also tax deductible. Thus, defendants argue,

Nevertheless, our analysis places us in apparent disagreement with Norberg. We find the issue before us significant

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13 (continued)

> the number of students for whom tuition tax deductions are available is not limited to the 3,360 full-time nonsectarian students as suggested by plaintiffs. Further, the affidavit of Ronald Moir states that over two million dollars were paid in tuition expenses to public schools. Plaintiffs' failure to include these types of tuition deductions as well as a variety of other charges depreciates the significance of their figures and calculations. The defendants further contend the allowable deductions for textbooks and transportation are not de minimus [sic] and must be considered. That thus, on a factual basis, the statute in application satisfies even a broad constitutional test of neutrality.

Mueller v. Allen, 514 F. Supp. 998, 1002 (D. Minn. 1981).

If a strict de jure analysis were advocated, one would be inviting legislatures to enact facially neutral statutes which could operate as mere sham. If a pure de facto approach were taken, a statute's constitutionality

not only to the State of Minnesota but to the nation. Eventually, if not within the parameters of this case, the Supreme Court must decide whether statutes such as those in Rhode Island and Minnesota can survive constitutional scrutiny.

Transportation.

No one seriously challenges the transportation deduction. If state financed transportation is permissible under Everson v. Board of Education, 330 U.S. 1 (1947), surely an indirect tax deduction to all Minnesota parents is

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13 (continued)

might turn on local annual statistics. That is, the same statute might be constitutional one year, and not the next, or in one state and not in another, depending upon the current statistical breakdown of sectarian and nonsectarian schools. Nothing so rigid or so arbitrary can be gleaned from precedent in this area.

constitutional. In Everson the statute was upheld not because the financial benefit was directed at parents but because the benefits were directed to all parents in the community at large. See 330 U.S. at 16. Clearly the primary effect of the transportation deduction of the Minnesota statute is not to aid the establishment of religion. See also Minn. Stat. Ann. §§ 123.76-123.80 (West Supp. 1982) (authorizes state to provide public transportation to parochial school students).

Textbooks.

Similarly, we find the tax deduction for secular textbooks and "instructional materials and equipment" to all parents to be constitutional. The deduction for secular textbooks for all parents falls within the constitutional protection of

Board of Education v. Allen, 392 U.S. 236 (1968). See Minn. Stat. Ann §§ 123.931-123.947 (West Supp. 1982) (authorizes state to provide educational aids such as textbooks, standardized tests and pupil support services for nonpublic school children). We acknowledge that the fact that the statute also permits a deduction for "instructional material and equipment" is troublesome. Relying upon Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977), the First Circuit in Norberg found these deductions objectionable. See also Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D. N.J. 1973), aff'd mem., 417 U.S. 961 (1974).

We view Meek, Wolman, and Marburger as distinguishable. In those cases

massive loans of instructional materials and equipment were made directly to the institutions themselves. As the Court observed in Meek:

> For the 1972-1973 school year the Commonwealth authorized just under $12 million of direct aid to the predominantly church-related non-public schools of Pennsylvania through the loan of instructional material and equipment pursuant to Act 195. To be sure, the material and equipment that are the subjects of the loan--maps, charts, and laboratory equipment, for example--are "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." [Meek v. Pittenger,] 374 F. Supp., at 660. But faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "when it flows to an institution in which religion is so

> pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion. Hunt v. McNair, 413 U.S. 734, 743.

421 U.S. at 365-66.

In the present case the tax benefit is directed to the parent and the student and not to the school. Although Nyquist finds that this fact alone does not immunize tax benefits to a parent from constitutional attack, we think it is a significant factor as it relates to the type of material and equipment which a student will purchase. The needs of the institution from the standpoint of instructional materials and equipment are distinct from the needs of the student. Instructional equipment equally useful in both secular and religious training by the institution presents a different concern than do supplies which a student

might purchase for classroom use.[14] The difficulties regarding the Establishment Clause evident in Meek and Marburger which involved massive loan programs are much different than those in the instant case where the effect of a possible tax deduction for the purchase of defined secular school materials is much more indirect.

The concerns of the Norberg court with church-state entanglement are well addressed by Judge Renner. He observed:

> The Supreme Court has implicitly recognized that church-state contacts occasioned by normal tax administration procedures do not give rise to excessive and unconstitutional government and

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[14]Although a ruler might be used in a mathematics class, it might also be used to measure mileage on a biblical map. Tennis shoes might be worn to gym class as well as to a religious training period. We question whether such uses might be seriously challenged as aiding religion.

religion entanglements. See Walz, 397 U.S. at 674-76 90 S.Ct. at 1414-15. Possible entanglement here is lessened by the fact that eligibility of schools is not determined by an in-depth case-by-case analysis of the genuineness of the schools' religious functions. Eligibility is clearly established if a school meets certain entirely secular requirements: nonprofit status, compliance with compulsory attendance laws, and adherence to state and federal civil rights statutes. While there may be times that certain deductions for textbooks or other specific expenses may call for an examination of impermissible purpose, the amount of entanglement will be minimal. Further, the primary enforcement tool will be an individual audit, which would not necessarily entangle the state impermissibly in church affairs. Plaintiffs fail to establish the reasonable likelihood that this section and any accompanying government regulation will involve intrusion into religious matters. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1116 (7th Cir. 1977), aff'd, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979).

Mueller v. Allen, 514 F. Supp. 998, 1003 (D. Minn. 1981).

Tuition.

We now turn to the more difficult

issue of whether the tuition deduction has the primary effect of advancing religion.

The district court emphasizes that the statute is neutral on its face in that it provides a tax deduction for all parents of both public and nonpublic school children. This fact did not deter the Norberg courts from finding that the primary effect of the statute was to aid religion since Rhode Island's public school children attended schools tuition free. In so finding Judge Pettine of the District of Rhode Island observed, "93.4% of the children attending school in Rhode Island whose parents are eligible for the challenged tuition deductions attend sectarian schools." Rhode Island Federation of Teachers v. Norberg, 479 F. Supp. 1364, 1366 (D. R.I. 1979).

Whether the Minnesota statute can withstand constitutional scrutiny turns on whether Nyquist can be distinguished. The Norberg court opined that it could not. We disagree.

The Nyquist Court struck down a direct tuition reimbursement of $50 to $100 per child available to parents with an annual taxable income of under $5,000[15] and a tax "credit" for families with an annual adjusted gross income of less than $25,000. The Court stated that the tax credit was, in form, "a tax deduction since it is an amount subtracted from adjusted gross income prior to computation of tax due." 413 U.S. at 789. However, the "deduction"

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[15]See also Sloan v. Lemon, 413 U.S. 825 (1973).

was not related to the amount actually spent for tuition but was in the form of a predetermined amount of tax "forgiveness." Id. The Nyquist Court concluded:

> In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education." 350 F. Supp., at 675.

413 U.S. at 790-91.

However, the Court specifically excepted from its ruling any decision as

to whether a "genuine tax deduction" is constitutionally acceptable under the "neutrality" test in Walz v. Tax Commission, 397 U.S. 664 (1970). 413 U.S. at 790 n.49. It is, of course, under that cloak of neutrality that defendants now argue.

In Nyquist it was urged that the fact that the New York tax credit was directed to the parent rather than to the schools was controlling. The Court, however, found that this distinction drawn from Everson and Allen was not determinative, that it was but one among many factors to be considered. 413 U.S. at 781. A more significant factor that may be extrapolated from Allen and Everson is the fact that those cases dealt with benefits available to all school

children, whereas the tax benefit in Nyquist was given only to those parents with children in private schools. The Nyquist Court emphasized the importance of the narrowness of the benefited class by comparing the beneficiaries under the New York statute to the broad class of intended beneficiaries in Walz. 413 U.S. at 794. Thus, the New York statute in Nyquist can be distinguished from the Minnesota and Rhode Island statutes on the following basis: (1) the statute in Nyquist operated as a tax credit, not as a true deduction; and (2) the tax benefits in Nyquist were limited to the class of parents of private school children, as opposed to the broad class of parents with dependents in both public and nonpublic schools benefited under the

Minnesota and Rhode Island statutes.[16]

These two factors did not deter with the court in Norberg from invalidating the Rhode Island law. The district court in Norberg found that the tuition deduction was still a charge upon the state. As the court said, it is "the economic equivalent of the state helping to provide for those expenses" and not "an abstention from taxation." The court

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[16]Defendants urge that the fact that the Minnesota statute has been unchallenged since 1955 is made relevant by the discussion of historical acceptance in Walz v. Tax Comm'n, 397 U.S. 664, 677-80 (1970) (Burger, C.J.). We disagree. As the district court noted in Norberg, "The Walz property tax exemptions were upheld not merely because of their long historical acceptance; rather, it was the reason underlying that history of tolerance that proved controlling." Norberg, 479 F. Supp. at 1371 n.9.

viewed it more as a subsidy than as the exemption designed in Walz to minimize the involvement and entanglement between church and state. Norberg, 479 F. Supp. at 1371.

Second, the district court in Norberg found that the fact that in Rhode Island the statute was applicable to parents of public as well as nonpublic school students was "mere window dressing." 479 F. Supp. at 1371. In Rhode Island, the court observed, the overwhelming majority of the taxpayers eligible for the tuition deduction sent their children to sectarian schools. Id.

It is not without difficulty that we reach our decision to sustain the Minnesota law. First, we are concerend with the fact that we are dealing with an indirect state subsidy of tuition which

can be viewed "as an incentive to parents to send their children to sectarian schools, or as a reward for having done so. . . . to preserve and support religion-oriented institutions." Sloan v. Lemon, 413 U.S. 825, 832 (1973). We are well aware that we are not dealing with secular textbooks or bus rides[17] but with tax benefits for tuition payments to elementary and secondary institutions, some of which provide religious training along with secular education. Nonetheless, contrary to plaintiffs' argument, the Minnesota statute has not singled out a class of citizens for a special economic benefit.

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[17] Everson and Allen held that the provision of secular books and transportation to all citizens reflected a neutral posture toward religious institutions.

It is neutral on its face; and, under the facts presented here, we cannot reject this facial neutrality as mere window dressing. In Nyquist and Marburger the only eligible parents were those who send their children to nonpublic schools. In the present case Minnesota has recognized tuition deductions for parents of public school attendees who pay tuition in various forms, i.e., tuition paid by public school students who attend outside their residence districts; summer school tuition; tutoring services; tuition for instruction provided the physically handicapped; and tuition for driver education. Plaintiffs concede that some 14-18% of Minnesota taxpayers qualifying for tuition deductions under the statute do so for expenses related to private nonsectarian schooling. This figure

however does not reflect the number of parents with dependents in public schools who collectively paid in 1978-79 in excess of two million dollars in tuition expenses.

In Nyquist each eligible taxpayer received an arbitrary deduction resulting in a definite tax benefit. In Norberg Rhode Island taxpayers' state income tax was directly related to a percentage of federal income tax and the amount of tax benefit from the challenged deduction depended upon the amount of the deduction and the federal income tax bracket. The court concluded that a tax benefit would result for any parent who owed federal income tax and paid tuition of dependents attending qualifying schools. It was estimated that eligible taxpayers in Rhode Island would receive an average tax

benefit of $33 from the deduction. Such is not the case in Minnesota. Under the Minnesota statute the state tax is not related to federal income tax, and whether a parent obtains a tax benefit depends upon whether the deduction is sufficient to move the taxpayer from a higher tax bracket to a lower one. Thus, in this sense, the indirect tax benefit to the school is more diffused and less certain. Unlike the statute in Nyquist, there is within the Minnesota statute no "legislative attempt to assure that each family would receive a carefully estimated net benefit." Nyquist, 413 U.S. at 790.

Contrary to the Norberg reasoning, we find that the Minnesota deduction available to all citizens should be viewed much the same as a charitable

deduction. See I.R.C. § 170. A statistical breakdown of beneficiaries is not necessary to conclude that the tax "forgiveness" provided in federal and state tax deductions for charitable contributions substantially benefits sectarian institutions. This creates a much greater, although indirect, subsidy of state and federal tax dollars to religious institutions than does a deduction for tuition payments to sectarian schools. Although the Supreme Court has never decided whether charitable deductions made available to all citizens are constitutional, we use the comparison merely to identify the imponderable problem presented if one is allowed to challenge a neutral statute made applicable to all citizens by a purely de facto analysis utilizing

statistical proofs. The fundamental issue is not whether some or even a substantial benefit accrues to a religious institution, but whether the principal or primary effect of the statute is to advance religion. Tilton v. Richardson, 403 U.S. 672,679 (1971).

In Nyquist the statute limited the class benefited to the parents of children in nonpublic schools. The Court emphasized that "it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor." Nyquist, 413 U.S. at 794. Here, as in Everson and Allen, all citizens are made eligible for the tax benefits. One of the problems, however, in giving blind adherence to Everson and Allen is the fact that in

both cases transportation and textbooks were not already furnished free by the statute to public school children. But what if they were? Would the amendment of the statute to include parochial students have been struck down as having been passed for religious purposes or having a primary effect of aiding religious schooling? We think not--at least under the Supreme Court's reasoning. State transportation in Everson was viewed as having a public purpose and fulfilling a public need. The mere fact that it coincided with individual desires to send children to a parochial school was deemed an inadequate reason to strike down the law.

There is no doubt that Minnesota could limit its tax deduction for tuition expenses to those parents in the public

school system required to pay tuition. This could easily be deemed a public need--even though it would affect only a minority of taxpayers with dependents in the public school system. On the other hand, if a state wishes to extend such tax benefits "to all its citizens without regard to their religious belief," it should be allowed to do so. Everson, 330 U.S. at 16. As the Supreme Court surmised in Roemer v. Board of Public Works, 426 U.S. 736, 746 (1976), parents who send their children to sectarian schools "need not be quarantined from public benefits that are neutrally available to all."

Notwithstanding plaintiffs' statistical arguments, which arguably indicate that the greater number of the class benefited are parents of church

school children, we find that there are substantial benefits flowing to all members of the public. By way of deduction we conclude, as defendants urge, that the State, in effect, abstains from taxing that income which has been denoted by a broad class of Minnesota citizens to their children's education. In so doing, the State has adopted a policy which is neutral toward religion by providing a tax benefit to those parents who qualify for a deduction for expenses incurred in sending their child to school.

Conclusion.

We have applied the three-pronged test of Lemon v. Kurtzman and hold that Minn. Stat. § 290.09, subd. 22, does not violate the Establishment Clause. We acknowledge that this case falls in the

gray area lying between constitutionally-upheld tax exemptions, see Walz, and unconstitutional tax "credits," see Nyquist. We have weighed all the factors; and, while we recognize the bestowing of some benefit to church-affiliated schools, we also find that any benefit to religion or involvement between church and state is so remote and incidental that the challenged deduction does not violate the constitutional wall separating church and state. We find that the dangers of Minn. Stat. § 290.09, subd. 22, are quite far removed from those dangers which prompted inclusion of the Establishment Clause in the Bill of Rights. Justice Powell stated in his concurring opinion in Wolman v. Walter:

> Our decisions in this troubling

area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in Meek v. Pittenger, 421 U.S. 349, 366 (1975), that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind--even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. Meek itself would have to be overruled, along with Board of Education v. Allen, 392 U.S. 236 (1968), and even perhaps Everson v. Board of Education, 330 U.S. 1 (1947). The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a

> legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

Wolman v. Walter, 433 U.S. 229, 262, (Powell, J., concurring in part, concurring in judgment in part, and dissenting in part).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Van D. Mueller, et al, Plaintiff, vs. Clyde E. Allen, Jr., et al, Defendant, and Dennis J. Berthiaume, et al, and Brenda B. Becker, et al, Intervenor-Defendants.	)	MEMORANDUM AND ORDER Civil 3-80-395

This action challenges the constitutionality of Minn. Stat. § 290.09(22) (1978), as violative of the

First and Fourteenth Amendments to the Constitution of the United States. Plaintiffs assert that the challenged statute is a law advancing an establishment of religion and is in restraint of the free exercise of religion. Accordingly, plaintiffs seek a judgment by this Court invalidating the statute and an injunction against its enforcement by the State of Minnesota.

Initially, suit was brought by five individual plaintiffs on behalf of the taxpayers of the State of Minnesota. Pursuant to defendant Allen's motion, three of the plaintiffs were dismissed from the lawsuit. See Memorandum and Order, dated Oct. 14, 1980. Dismissal was based upon the doctrine of res judicata in that the three plaintiffs were found to have had an interest in

M.C.L.U. v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978), an action that upheld the challenged statute against a constitutional challenge similar to the one now being advanced. This Court denied defendant's motion to dismiss the remaining plaintiffs, holding that Roemer was not a representative taxpayers' suit and, thus, did not bar the present taxpayers from bringing this action. The Court did not decide the stare decisis effect of Roemer since the factual record was, at that time, incomplete. At present, the factual basis of the case is not in dispute, although the parties differ as to inferences to be drawn and their legal consequences. Summary judgment is now appropriate.

I. FACTS

Intervenor-defendants Berthiaumes,

Dziks, and Fujans contend, as a preliminary matter, that the affidavits of James A. Lee and Phillip C. Miller, submitted by plaintiffs, should not properly be considered. The Lee affidavit purports to reveal the results of his examination of certain records of the Minnesota Department of Education relating to amounts of tuition paid by public school children. This information is offered to support plaintiffs' statistical argument.

Defendants object to Lee's affidavit on the ground that it is hearsay and barred by Fed. R. Civ. P. 56(e) and Fed. R. Evid. 901 since the affidavit fails to show that Lee possesses any personal knowledge of the matters contained in the affidavit. Defendants also argue that

the affidavit is barred by Fed. R. Evid. 1002, in that the orginals of the documents have not been produced. Since Lee's affidavit purports to summarize portions of certain state records, defendants contend that such secondary evidence may not be submitted. Finally, defendants challenge the affidavit for failing to include sworn or certified copies of the documents and records referred to, thus contravening Fed. R. Civ. P. 56(e).

Miller's affidavit is objected to on the grounds that it is hearsay; also that it has not been authenticated as required by Fed. R. Civ. P. 56(e) and Fed. R. Evid. 901. Defendants contend it is not possible to determine from the affidavit whether Miller is competent to authenticate the exhibit; that since

Miller has no connection with the Minnesota Department of Revenue, he lacks personal knowledge of the information he seeks to convey.

There may well be merit to defendants' objections, but, for purposes of this opinion, they are not being considered.

The challenged statute, section 209.09(22), authorizes Minnesota taxpayers to claim income tax deductions for their dependents' tuition, textbook, and transportation expenditures. The provision was orginally enacted in 1955 and subsequently amended in 1976. Section 290.09(22) is a "true tax deduction statute. It does not provide direct financial aid to its beneficiaries; it does not directly subsidize any activity; and it does not

operate as a credit against a tax already determined. Qualifying expenditures are deductible only in their actual amounts and are subject to certain maximums. The deductions are subtracted from gross income and thus reduce the tax base. They result in a tax benefit only if the deduction moves the taxpayer into a lower tax bracket.

Deductions are subject to a maximum of $500 for each elementary school dependent and $700 for each secondary school dependent. There are three categories: Tuition; transportation; and textbooks.

Tuition includes:

1. Tuition in the ordinary sense.
2. Tuition to public school students who attend public

schools outside their residence school districts.

3. Certain summer school tuition.
4. Tuition charged by a school for slow learner private tutoring services.
5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school.
6. Tuition charged by a private tutor or by a school that is not a elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school.
7. Montessori School tuition for

grades K through 12.

8. Tuition for driver education when it is part of the school curriculum.

Allowable deductions for transportation expenditures include the cost of transporting students in school districts that do not provide free transportation, the cost of transporting students who live in one district but attend school in another, and the cost of transporting students who attend school in their residence district but who do not qualify for free transportation because of proximity to their schools of attendance.

Textbook deductions include not only secular textbooks but also other necessary equipment, such as:

1. Cost of tennis shoes and sweat-

suits for physical education.

2. Camera rental fees paid to the school for photography classes.
3. Ice skates rental fee paid to the school.
4. Rental fee paid to the school for calculators for mathematics classes.
5. Costs of home economics materials needed to meet minimum requirements.
6. Costs of special metal or wood needed to meet minimum requirements of shop classes.
7. Costs of supplies needed to meet minimum requirements of art classes.
8. Rental fees paid to the school for musical instruments.
9. Cost of pencils and special

notebooks required for class.

II. DISCUSSION

A. The stare decisis effect of the Roemer case.

In Roemer, a three-judge district court upheld the constitutionality of the statute. That court held the statute to be neutral and neither advances nor impedes religious activity, that it benefits the parents of children attending both public and private schools, has received unchallenged historical acceptance, and is analogous to the long-recognized practice of tax deductible contributions to religious and charitable organizations. Roemer, 452 F. Supp. at 1321-22.

A court is not irretrievably bound by its own precedents, but in the interests of uniformity, stability, and certainty

in the law, will follow the rule of law established in earlier cases unless clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent. 1B Moore's Federal Practice ¶0.402[3.-1] (1965 & Supp. 1980-81). However, a court's decision is not binding upon courts of equal rank. Moreover, a specially convened three-judge district court is still a district court. Farley v. Farley, 418 F.2d 1009, 1012 (2d Cir. 1973) (decision of a three-judge district court is no more of a precedent than any other district court decision and is not binding on another district court.).

Thus, this court is not bound by the Roemer ruling. But, this does not mean

that the prior ruling is without value in the adjudication of this case. The same issues raised by the parties here were raised in Roemer. Plaintiffs contend that not only was Roemer incorrectly decided, but that subsequent case law and facts not before the Roemer court establish the unconstitutionality of the challenged statute. An examination of the underlying issues is thus required.

Only one aspect need be discussed in detail, since the new facts offered by plaintiffs relate only to the "primary effect" element of the Establishment Clause Test. The remaining elements were handled adequately in Roemer and plaintiff offers nothing new challenging its analysis and conclusions.

B. Whether section 290.09(22) violates the Establishment Clause of the First

Amendment.

The Supreme Court has formulated a three-prong test by which the constitutionality of legislative action allegedly benefitting religious activity may be judged. In order to comport with the directive of the Establishment Clause such action must: (1) have a secular legislative purpose; (2) its principal or primary effect must be such as to neither advance nor inhibit religion; and (3) the action must not foster an excessive entanglement of the state in religious affairs. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

Plaintiffs contend that the challenged statute does not satisfy the "secular purpose" segment of the Establishment Clause test, but decline discussion of the issue at this time.

Since failure to satisfy any one of the three elements of the test requires a declaration of unconstitutionality, plaintiffs raise the issue solely for purposes of possible subsequent appeal. Defendants contend that the statute has a secular purpose since it seeks to assist Minnesota taxpayers in providing dependents with a safe, effective, and varied educational environment. Such a legislative purpose is presumptively valid and plaintiffs have not indicated any circumstances to rebut that presumption. Lemon, 403 U.S. at 613.

Plaintiffs' major attack on section 290.09(22) centers on the "primary effect" element of the Lemon test. Specifically, plaintiffs contend that the tuition component of the challenged statute has the primary effect of

advancing religion and religious activity. Although the tuition credit is available to all taxpayers regardless of whether their dependents attend sectarian or nonsectarian schools, plaintiffs assert that at least 82% and perhaps upward to 96% of the students who pay tuition attend sectarian schools. Thus, plaintiffs urge, section 290.09(22) is not a tax measure providing broad relief to the general public, but is directed toward and has the primary effect of advancing religion. Plaintiffs contend that the primary focus of the Court's analysis should be on the tuition component of the deduction since the permissible textbook and transportation deductions are de minimus.

Plaintiffs statistical calculations are based on data provided by the

Minnesota Department of Education indicating that 90,954 pupils attended nonpublic schools within the State during 1979-80. Of these, 4.56% attended schools purporting to be nonsectarian. During the 1978-79 school year, 3.71% of the 88,524 students attending nonpublic schools attended nonsectarian schools. These figures allegedly show that, in actuality, taxpayers qualifying for benefits under the law do so in the overwhelming number of instances by reason of tuition payments for religious education. Plaintiffs, in essence, attack the facial neutrality of the statute, asserting that its actual effect is skewed toward the advancement of religion, thus falling within the prohibition prescribed in Committee for Public Education v. Nyquist, 413 U.S. 756

(1973); Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3d Cir.), aff'd, 442 U.S. 907 (1979); and Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980). These cases are largely distinguishable from the one at hand. See Memorandum and Order, dated Oct. 14, 1980, pp. 4-7.

Defendants, in turn, challenge plaintiffs' argument on both legal and factual grounds. Defendants argue, first, that there is no Supreme Court authority supporting plaintiffs' contention that the breadth of class issue requires a factual inquiry when the class includes both public and private school children, that is, a facially neutral statute. Defendants' argument is weakened by the fact that the Supreme Court has never had the issue before it

for resolution. See Nyquist, 413 U.S. at 782 n.38. It is certainly plausible that if faced with the precise issue, the Court might require a factual inquiry into the breadth of the affected class, even when the class includes both public and private school children. See id.; Norberg, 630 F.2d 585.

Defendant also vigorously argue that there are errors in plaintiffs' factual and statistical data. From their data, plaintiffs project that at its theoretically broadest scope 14-18% of the taxpayers qualifying for a tuition deduction under the challenged statute do so by reasons of expenses related to nonsectarian schooling. Defendants contend, however, that plaintiffs have incorrectly assumed that only full-time tuition payments are relevant and have

ignored such items as tuition for summer school and for certain other courses such as driver's education that are also tax deductible. Thus, defendants argue, the number of students for whom tuition tax deductions are available is not limited to the 3,360 full-time nonsectarian students as suggested by plaintiffs. Further, the affidavit of Ronald Moir states that over two million dollars were paid in tuition expenses to public schools. Plaintiffs' failure to include these types of tuition deductions as well as a variety of other charges depreciates the significance of their figures and calculations. The defendants further contend the allowable deductions for textbooks and transportation are not de minimus and must be considered. That thus, on a factual basis, the statute in

application satisfies even a broad constitutional test of neutrality.

Defendants point also to the statute's operation as a "true deduction" as supporting the conclusion that the section does not have a primary effect of advancing religion. The Supreme Court has never decided the constitutionality of such a deduction for educational expenses. See Nyquist, 413 U.S. at 790 n.49. The nature of a deduction as opposed to a credit makes the benefit more remote. The significance of this characterization is that the more remote and indirect the benefit conferred, the more likely it will be upheld. Walz v. Tax Commission, 397 U.S. 664, 672-76 (1970).

As discussed in Roemer, the key determination to be made here is whether

the case is closer contitutionally to Nyquist or to Walz as to the benefit being conferred on religious institutions. This Court concurs in the analysis and judgment reached in Roemer that Walz is the closer controlling precedent. Moreover, the factual presentation here, rather than undercutting the Roemer decision, provides the factual support that was absent but assumed in that case. The defendants have shown that the statute provides widely distributed tax relief. Such relief is available to all parents with dependents attending elementary and secondary schools. This is a critical element since a law does not advance religion when its benefits are neutrally and widely distributed and from which religious institutions benefit only

incidentally and indirectly. Walz, 397 U.S. at 672-76. This conclusion is buttressed by the long-standing acceptance of an analog to section 290.09(22): deductibility of charitable and religious contributions from federal and state income taxes.

Plaintiffs further contend that the statute fails to satisfy the excessive entanglement test since the State's enforcement responsibility carries with it the danger of an impermissible entanglement of government in religious affairs. The Roemer court dismissed this argument as unsubstantial. Roemer, 452 F. Supp. at 1318 n.1. The Supreme Court has implicitly recognized that church-state contacts occasioned by normal tax administration procedures do not give rise to excessive and

unconstitutional government and religion entanglements. See Walz, 397 U.S. at 674-76. Possible entanglement here is lessened by the fact that eligibility of schools is not determined by an in-depth case-by-case analysis of the genuineness of the schools' religious functions. Eligibility is clearly established if a school meet certain entirely secular requirements: non-profit status, compliance with compulsory attendance laws, and adherence to state and federal civil rights statutes. While there may be times that certain deductions for textbooks or other specific expenses may call for an examination of impermissible purpose, the amount of entanglement will be minimal. Further, the primary enforcement tool will be individual audit, which would not necessarily

entangle the state impermissibly in church affairs. Plaintiffs fail to establish the reasonable likelihood that this section and any accompanying government regulation will involve intrustion into religious matters. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1116 (7th Cir. 1977), aff'd, 440 U.S. 490 (1979).

C. Whether section 290.09(22) violates the Free Exercise Clause of the Constitution.

Plaintiffs argue that by permitting some citizens to reduce the amount of tax paid to the State the statute operates to single out for lessor burdens certain forms of religious activity. It, thus, increases amounts other citizens must contribute to support predetermined levels of state expenses. This argument

tends to overlook the deductions which are available to public school parents, the substantial revenues received by public school districts, and the fact that taxpayers who have dependents in nonpublic schools save remaining taxpayers the costs of educating those dependents. Moreover, plaintiffs have not alleged how their religious beliefs are infringed. McGowan v. Maryland, 366 U.S. 420, 429-30 (1968).

III. CONCLUSION

Plaintiffs have failed to convince the Court that Roemer was incorrectly decided or that there are additional facts that demonstrate the statute has the primary benefit of advancing religion. Plaintiffs' statistical argument lacks credibility by reason of omissions of serious significance. The

statute is neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion. The statute is constitutional and summary judgment in favor of defendant shall be entered.

Based on the foregoing, the record, and the briefs and arguments of counsel,

IT IS HEREBY ORDERED that

1. Plaintiffs' Motion for Summary Judgment is denied.

2. Defendant's Cross-Motion for Summary Judgment is granted.

3. Plaintiffs' Complaint is hereby dismissed.

Dated: May 13, 1981.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 81-1569

Van D. Mueller, etc., et al,

Appellants,

vs.

Clyde E. Allen, Jr., etc., et al,

Appellees.

This appeal from the United States District Court for the ----- District of Minnesota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and

the same is hereby, affirmed in accordance with the opinion of this Court.

A True Copy:

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit

FILED
DEC 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER and JUNE E. NOYES,

Petitioners,

—v.—

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY I. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 29, 1982
CERTIORARI GRANTED OCTOBER 4, 1982

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Affidavit of Michael J. Lovett A28

Affidavit of James A. Lee, Jr. A34

Affidavit of Ronald Moir A36

Statement of the Evidence When No Report was Made Pursuant to [F.R.A.P.] Rule 10C A45

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[1]The Opinion of the Court of Appeals, Memorandum and Order of the District Court, and Judgment of the Court of Appeals are reproduced in the Appendix to Petitioners' Petition for a Writ of Certiorari.

RELEVANT DOCKET ENTRIES

7-1-80	Complaint and Requests for Admission and Interrogatories filed. Summons issued.
9-15-80	Order granting motions of intervenors to intervene as additional defendants individually and on behalf of the taxpayers of the State of Minnesota is filed. Intervenors are to serve an Answer to the Complaint within ten (10) days of the service of the Order.
9-26-80	Order filed granting defendant Allen's motion for a protective order. Order stays plaintiffs' discovery until such time as defendant's motion to dismiss has been

determined. If such motion has not been determined within thirty (30) days of the hearing on such motion, plaintiffs may move for lifting of the order.

10-14-80 Memorandum and Order of the District Court granting defendant Allen's motion to dismiss as to Plaintiffs Randall Tigue, Albert L. Gallop and Edward C. Bolstad. Defendant Allen's Motion to dismiss as to Van D. Mueller and June Noyes is denied. Judgment filed.

11-1-80 Defendants' Response to Plaintiffs' Requests for Admission and Interrogatories

	is filed. Answer of defendant Allen filed.
11-20-80	Defendants' Supplemental Response to Plaintiffs' Request for Admission is filed.
1-26-81	Plaintiffs' Notice of Motion and Motion for Summary Judgment filed. Affidavits of Michael J. Lovett and James A. Lee, Jr. are attached.
2-23-81	Defendants' Notice of Motion and Motion for Summary Judgment in defendants' favor is filed.
5-13-81	Memorandum and Order of the District Court filed, denying plaintiffs' Motion for Summary Judgment, granting defendants' Cross-Motion for Summary

	Judgment and dismissing the Complaint. Judgment filed.
5-29-81	Notice of Appeal by plaintiffs from Order of the District Court is filed.
6-9-81	Statement of the Evidence Where No Record was Made Pursuant to Rule 10C is filed by plaintiffs. No exception subsequently filed by respondents.
5-28-82	Certified copy of Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit, affirming the Judgment of the District Court, is filed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Van D. Mueller, individually and on behalf of the taxpayers of the State of Minnesota, and

June Noyes, individually and on behalf of the taxpayers of the State of Minnesota,

Plaintiffs,

vs.

Clyde E. Allen, Commissioner of the Department of Revenue for the State of Minnesota,

Defendant.

and

Dennis J. Berthiaume, Karen F. Berthiaume, Thomas W. Dzik, Mary J. Dzik, Edward F. Fujan, and Joleen A. Fujan,

and

Brenda B. Becker, Richard C. Hollingsworth,

Civil Action

No. 3-80-375

DEFENDANTS RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION AND INTERROGATORIES

Marjorie Hollingsworth, Roger DeHaan, and Dorothy DeHaan, each individually and on behalf of the taxpayers of the State of Minnesota,

Intervenors.

TO: Plaintiffs and their attorney, William I. Kampf, Ninth Floor, Commerce Building, St. Paul, Minnesota 55101

Defendant Clyde E. Allen, Jr. for his response to Request for Admission and Interrogatories states as follows:

REQUEST FOR ADMISSION NUMBER ONE

Admit or deny that all or some of those costs for which deductions are allowed under the challenged statute finance, support, and subsidize the teaching, propogation, and promotion of religion.

The Department of Revenue does not

have this information.

REQUEST FOR ADMISSION NUMBER TWO

Admit or deny that Defendant has promulgated no rule, regulation, or administrative policy, and that no such provision is enforced by Defendant de facto, which has as its effect the ensurance that amounts for which deductions are allowed under the challenged statute do not finance, support, and subsidize the teaching, propogation, and promotion of religion.

Admits

REQUEST FOR ADMISSION NUMBER THREE

Admit or deny paragraph nine (9) of the Plaintiffs' Complaint.

The Department of Revenue does not have this information.

REQUEST FOR ADMISSION NUMBER FOUR

Admit or deny paragraph eleven (11)

of the Plaintiff's Complaint.

Admits

REQUEST FOR ADMISSION NUMBER FIVE

Admit or deny that the costs for which deductions are allowed under the challenged statute are paid primarily to elementary and secondary schools having as a central purpose the promotion and advancement of religion.

The Department of Revenue does not have this information.

INTERROGATORY NUMBER ONE

Identify those facts which form the basis of your denial, if any, of each of the above Requests for Admission.

N/A

INTERROGATORY NUMBER TWO

State the number corresponding to those numbers found in paragraph nine (9) of the Plaintiffs' Complaint for

enrollments in Minnesota elementary and secondary schools for the 1979-1980 school year.

The Department of Revenue does not have this information.

INTERROGATORY NUMBER THREE

What was the revenue loss for the most recent year for which data is available by reason of deductions allowed under the challenged statute.

Estimated revenue loss of 2.4 million.

INTERROGATORY NUMBER FOUR

Identify those mechanisms used by the Defendant for the investigation of uses to which amounts deducted under the challenged statute are put.

If a return is audited, receipts are requested for all claimed deductions, including those under § 290.09, subd. 22.

INTERROGATORY NUMBER FIVE

Separately identify the number of individuals taking deductions under the challenged statute in the most recent year for which data is available by reason of attendance by dependents at:

(1) non-public, sectarian elementary and secondary schools

(2) non-public, non-sectarian elementary and secondary schools.

The Department of Revenue does not have this information.

INTERROGATORY NUMBER SIX

Separately identify the aggregate amount, in dollars, of deductions taken by individuals under the challenged statute in the most recent year for which data is available by reason of attendance at:

(1) non-public, sectarian

elementary and secondary schools

(2) non-public, non-sectarian elementary and secondary schools.

The Department of Revenue does not have this information.

INTERROGATORY NUMBER SEVEN

What is the median percentage of tuition costs used by sectarian schools in the State of Minnesota for the teaching, propogation, and promotion of those subjects not legally and commonly taught in the public schools of the State of Minnesota.

The Department of Revenue does not have this information.

INTERROGATORY NUMBER EIGHT

Identify each and every standard used by the Defendant for distinguishing between textbooks the cost of which is deductible under the challenged statute

and textbooks the cost of which is not deductible under the challenged statute.

Minn. Stat. § 290.09, subd. 22. See also attached memoranda of Gerome T. Caulfield and D. E. Lahti.

INTERROGATORY NUMBER NINE

Identify each and every standard used by the Defendant in the identification of instructional materials and equipment the cost of which is deductible under the challenged statute.

Minn. Stat. § 290.09, subd. 22. Also see attached memoranda of Gerome T. Caulfield and D. E. Lahti.

INTERROGATORY NUMBER TEN

How many non-public elementary and secondary schools in the State of Minnesota are affiliated with a religious organization, sect, or institution.

The Department of Revenue does not

have this information.

INTERROGATORY NUMBER ELEVEN

Detail the number of religiously affiliated elementary and secondary schools in the State of Minnesota according to their denominational affiliation.

The Department of Revenue does not have this information.

WARREN SPANNAUS
Attorney General

By /s/ William P. Marshall
WILLIAM P. MARSHALL
Special Assistant
Attorney General

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Telephone: 612/296-3206
Attorneys for Defendant

STATE OF MINNESOTA

DEPARTMENT of Revenue-Income Tax

OFFICE MEMORANDUM

DATE: February 17, 1977

TO : ALL EXAMINERS

FROM : G. T. Caulfield, Director /s/GTC
Income Tax Division

PHONE: 3436

SUBJECT: TUITION, TRANSPORTATION AND TEXTBOOK EXPENSE

We have been asked whether or not swimsuits, hockey equipment and other equipment for extra curricular activities and fees for such activities are deductible.

Section 290.09, Subdivision 22, states "As used in this subdivision, 'textbooks' shall mean and include books

and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this State . . . . .". It is determined that charges for equipment used in extra curricular activities does not fall within the definition of text books as used in this subdivision and, therefore, are not deductible.

Fees for such extra curricular activities are also not deductible as they do not fall within the definition of tuition. An exception to this rule would be if the student was given course credit for such

activity, the fee would be deductible as tuition.

GTC/sk

[Names of individuals to whom copies of the Memorandum were sent have been omitted.]

STATE OF MINNESOTA

DEPARTMENT of Revenue

DATE: 7/29/77

TO : Joel Nopola,
Assistant Director
Field Operations Division

FROM : G. T. Caulfield, Director /s/GTC
Income Tax Division

PHONE: 3436

SUBJECT: Tuition and Transportation Expense

The memo issued on February 17, 1977 would be the present position of the Department regarding fees paid for extra curricular activities.

Such fees or equipment purchased in connection with any activity for which

course credit is not granted will not be allowed.

GTC/WAS/ml
copy of 2-17-77 attached

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

OFFICE MEMORANDUM

DATE: February 2, 1978

TO : ALL EXAMINERS

FROM : D. E. LAHTI, Assistant Director
Income Tax Division /s/ DEL

PHONE: 3438

SUBJECT: MONTESSORI SCHOOL TUITION

The question has been raised whether the tuition expenses for Montessori schools is eligible for an income tax deduction under Mn. Stat. 290.09, subd. 22.

The expenses for tuition and transportation as well as any other expenses allowed by Mn. Stat. 290.09, subd. 22 that are paid to Montessori schools for kindergarten through grade 6

are allowable deductions not to exceed $500 for each dependent.

Care must be taken to determine that the expenses are not for pre-kindergarten level. The pre-kindergarten expenses are not deductible.

The actual kindergarten expenses paid to the Montessori schools would be deductible whether the school district in which the taxpayer lives requires kindergarten or not. The school must be located within the 5 state district as set out in the statute.

If the Montessori school tuition is paid for grades 7 through 12, the expenses limit per dependent is $700 as with any other school.

DEL:JLS:eah

STATE OF MINNESOTA

DEPARTMENT of Revenue

OFFICE MEMORANDUM

DATE: March 27, 1979

TO : GROUP CHIEFS
(Show to All Your Examiners)

FROM : Gerome T. Caulfield, Director
Income Tax Division /s/GTC
PHONE: 3436

SUBJECT: Tuition and Transportation Expense

We have been asked about the deductibility of the following items under M.S. 290.09, subd. 22. The items and answers are:

1. Camera for a photography class.
   a. The rental fee paid

to a school	Yes.
b. Purchase	No.
2. Gym clothes for physical education class.	
a. Tennis shoes and sweatsuits.	Yes, if required.
b. Ice skates-rental fee paid to school	Yes.
-purchase	No.
3. Musical instruments.	
a. Rental fee paid to school	Yes.
b. Purchase	No.
4. Band trips	No.
5. Calculators for math class.	
a. Rental fee paid to school	Yes.

	b. Purchase	No.
6.	Lab fees.	Yes.
7.	Field trips.	Yes, if required.
8.	School uniforms.	No.
9.	Trips to foreign countries to learn languages sponsored by school.	No.
10.	Choir outfits. Some schools require a certain color of dress pants and shirt or blouse and skirt.	No.
11.	Choir trips.	No.

12. Home economics class supplies and cloth for sewing projects.	Yes, only for the minimal requirements for the course.
13. Shop class purchasing special kind of wood or metal.	Yes, only for the minimal requirements for the course.
14. Art supplies for art class.	Yes, only for the minimal requirements for the course.

15. Private tutoring for slow learners to keep up with classmates.	Yes, if tuition charged by the school.
16. Driver's training.	
a. Offered by school	No.
b. Private lessons	No.
17. Cap and gown rental required to graduate with the class.	No.
18. Pencils, specific type of notebooks and required material for each individual class.	Yes.
19. Public transportation to school-MTC or taxicab	Yes.
20. Parents using their own car to take students to school.	No.

21. Summer school to keep up with classmates. Yes.

The following guidelines can be used to determine if other items are deductible or not:

1. Is the material to be primarily used for the class and not for personal use?
2. Only the basic minimum required expense can be deducted.
3. It is consumed in the normal course of the class.

GTC/DHB/ml

[Names of individuals to whom copies of the Memorandum were sent have been omitted.]

STATE OF MINNESOTA

DEPARTMENT of Revenue

OFFICE MEMORANDUM

DATE: January 7, 1980

TO : GROUP CHIEFS

(Show to All Your Examiners)

FROM : Gerome T. Caulfield, Director

Income Tax Division /s/GTC

PHONE: 3436

SUBJECT: Tuition and Transportation Expense

Driver's education class is not an extracurricular activity if the high school offers the class as an elective and the student receives credit towards the student's high school graduation. A driver's education class that meets these qualifications is part of the high school curriculum and fees charged a student to

take the class will qualify for the deduction provided in Minn. Stat. Section 290.09, subd. 22. To the extent that the previous memo, issued on March 27, 1979, is inconsistent, that memo is superseded.

When a school offers driver's education to its students but does not provide any graduation credit for the completion of the course, the fee charged by the school is not deductible because it is an extracurricular activity.

GTC/DHB/ml

[Names of individuals to whom copies of the Memorandum were sent have been omitted.]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action

No. 3-80-375

[Title omitted in printing]

DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' REQUEST FOR ADMISSION

TO: Plaintiffs and their attorney,
William I. Kampf, Ninth Floor,
Commerce Building, St. Paul,
Minnesota 55101

REQUEST FOR ADMISSION NO. 3.

Admit or deny paragraph (9) of the plaintiffs' Complaint.

Upon information informally received from the Department of Education, defendants admit as follows:

Of the total number of students enrolled in Minnesota elementary and

secondary schools for the school year 1978-1979, eighty-eight thousand five hundred twenty-four (88,524), were enrolled in non-public schools. Of these, eighty-five thousand two hundred forty-three (85,243), were enrolled in sectarian schools, and three thousand two hundred eighty-one (3,281) were enrolled in schools considering themselves non-sectarian. Eight hundred five thousand one hundred fifty-five (815,055) plus one thousand two hundred twenty-six (1226) pre-kindergarten and handicapped were enrolled in Minnesota public elementary and secondary schools for the same period. 62.60 students were enrolled in 1976-1977 in public schools located in districts outside of their residence, requiring payment of tuition, textbook, and/or transportation costs by

their parents or guardians directly.

This data was not compiled for 1978-1979.

Dated: November 19, 1980

WARREN SPANNAUS
Attorney General

/s/ William P. Marshall
WILLIAM P. MARSHALL
Special Assistant
Attorney General

515 Transportation Bldg.
St. Paul, Minnesota 55155
Telephone: 612/296-3206
Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action

No. 3-80-395

AFFIDAVIT

[Title omitted
in printing]

Michael J. Lovett, being first duly sworn on oath, states and deposes to the Court as follows:

1. I am Supervisor, Education Statistics Section, Minnesota Department of Education.

2. The attached letter, dated December 22, 1980, and addressed to William I. Kampf, St. Paul, MN, was written by me and my signature is affixed thereon.

Further than this your affiant sayeth naught.

/s/ Michael J. Lovett

[Jurat omitted in printing]

MINNESOTA STATE DEPARTMENT OF
EDUCATION
Capitol Square, 550 Cedar Street
St. Paul, Minnesota 55101
Phone: 296-7683

December 22, 1980

William I. Kampf
Ninth Floor, Commerce Bldg.
St. Paul, MN 55101

Dear Mr. Kampf:

This is in response to your request of November 24 for three pieces of information. I understand Gary Farland of the Department of Education's State Aids Section spoke to you over the telephone about the first piece of information requested. It was decided you would send a law clerk over to examine the reports State Aids has on

F-29-6's, "Special Report of School Districts for Aid."

In an effort to answer the second question, one of our staff research analysts, Sharon Sorenson, has attempted to identify the number of Minnesota students attending school in the four bordering states. Because these children are computer coded as nonresidents only, whether they are out-of-state or in-state pupils, it's nearly impossible for someone in our department to determine the figure you've requested. For our purposes--state aids, for example--it doesn't matter that these pupils do not live in Minnesota; the important factors are that they are not residents of the school district they attend and tuition is paid by the resident school district.

Sharon also called the state

departments of education in Wisconsin, Iowa, South Dakota, and North Dakota but these departments code out-of-state students in a similar manner. The only suggestion as to how to arrive at this figure is to contact all the school districts in Wisconsin, Iowa, South Dakota, and North Dakota that border on Minnesota. The superintendents of each of these districts should be able to tell whether or not they have Minnesota students attending their districts. But even if this were a feasible project, a few students would be missed because they may attend a school farther from the border than this.

Your third question is answerable. Of the 533 nonpublic schools for which we have 1979-80 school year enrollment data and which enroll children of at least

kindergarten age, 53 report themselves nonsectarian. These 53 schools represent 4,146 students, or 4.56 percent of the 90,954 total number of nonpublic students.

Sincerely,

/s/ Michael J. Lovett

Michael J. Lovett

Supervisor, Education Statistics Section

MJL:lla

AN EQUAL OPPORTUNITY EMPLOYER

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action

No. 3-80-395

AFFIDAVIT

[Title and jurat
omitted in printing]

JAMES A. LEE, JR., being first duly sworn on oath, states and deposes as follows:

1. I am a law student assisting William I. Kampf, attorney for plaintiffs, in the above captioned matter.

2. On January 20, 1981, I examined four files of documents entitled State Report No. F-29-6, now in the custody of the Minnesota Department of Education, State Aids Division.

3. State Report No. F-29-6 is

prepared by the Supreintendents [sic] of the publis [sic] school districts of Minnesota and compiled in Minnesota.

4. One item of data reported in these documents is the number of school children in grades K-12 in each of the public school districts of Minnesota who pay tuition to attend the schools of that district.

5. I compiled this data for the school years 1977-1978 and 1978-1979, and found that forty (40) and seventy nine (79) schoolchildren, respectively, met the description above.

FURTHER THAN THIS YOUR AFFIANT SAYETH NOT.

/s/ James A. Lee, Jr.
JAMES A. LEE, JR.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action

No. 3-80-395

AFFIDAVIT OF
RONALD MOIR

[Title and jurat
omitted in printing]

RONALD MOIR, being duly sworn, deposes and states:

1. I am presently the Director of School Financial Management for the Department of Education of the State of Minnesota and have held this position since July 1, 1975.

2. My responsibilities include, but are not limited to the processing of summary financial data from Minnesota School Districts, according to the

Uniform Financial Accounting and Reporting Standards.

3. Included in the financial data collected by the Department are the dollar amounts received by the State from tuition and fee payments from patrons. These dollar amounts are compiled on a yearly basis pursuant to Account Code 1-10.21 and 1-10.38 of the "Manual of Instructions for Uniform Financial Accounting for Minnesota School Districts". A copy of these account definitions are attached here to and incorporated by reference as Exhibit A.

4. The following dollar amounts have been compiled pursuant to the regulations established in the Manual of Instructions for the year 1978-1979.

Account Code 1-10.21

Regular Day School Tuition From Patrons:

Revenues from students, parents or guardians as tuition payments for education classes. Included is the charge for driver education, other than summer school.

1978-79 Total Payment to all districts for K-12 students was $2,005,142.00 (two million five thousand one hundred forty two dollars).

Account Code 1-10.38

Fees From Patrons

Revenues from fees that a school board may charge a student pursuant to Minn. Stat. §§ 120.71 - 120.76 (1978).

1978-1979 Total fees from Patrons: $907,204.00 (nine hundred seven thousand two hundred and four dollars).

Further, affiant saith not.

/s/ Ronald Moir
RONALD MOIR

MANUAL OF INSTRUCTIONS FOR UNIFORM FINANCIAL ACCOUNTING FOR MINNESOTA SCHOOL DISTRICTS

(1977 Revision)

STATE OF MINNESOTA

DEPARTMENT OF EDUCATION

St. Paul, Minnesota

property (M.S. 273.02, subd. 4), state forest land (M.S. 89.036), tree growth (M.S. 270.38, subd. 8), auxiliary forest (M.S. 88.51, subd. 1 and 88.52, subd. 4) and late settlement interest (M.S. 276.11).

1-10.21 Regular Day School Tuition from Patrons

Enter revenues from students, parents, or guardians as tuition payments for education classes. Include the charge for driver education, other than summer school.

1-10.38 Fees from Patrons

Enter revenues from fees that a school board may charge a student pursuant to M.S. 120.71 to 120.76.

1-10.4 Student Activity Revenue

Enter revenues from cocurricular and extracurricular student activities. See definitions of cocurricular and extracurricular activities under the student activity expenditure section in the 1000 series.

1-10.41 Athletics

1-10.411 Boys

1-10.412 Girls

1-10.413 Boys and Girls

1-10.42 Other (additional codes to be added as needed)

1.10.8 Other Revenue from Local Sources

1-10.82 Interest Income

Enter interest income from temporary investments and interest income from inter fund loans.

1-10.88 Miscellaneous Revenue from Local Sources

(Formerly 10.84, 10.85, 10.86, 10.88, 45.0)

1.10.881 Rent from School Facilities

Enter revenues from the rental of school property which is being used for school purposes. Examples: rental of auditoriums, gymnasiums, cafeteria, lunchrooms, and classrooms.

1.10.882 Rent from Property Other than School Facilities

Enter gross revenues from rents and leases of pro-

perty which is not being
used for school purposes.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action

No. 3-80-395

STATEMENT
OF THE
EVIDENCE
WHEN NO
REPORT
WAS MADE
PURSUANT TO
RULE 10C

[Title omitted
in printing]

Plaintiffs/Appellants in the above-entitled proceeding add this Statement of Evidence regarding certain proceedings had on February 23, 1981; said proceedings had before Magistrate Cudd when no reporter was present. During the course of argument of unrelated Motion to Compel Response to Request for Admission, William P.

Marshall, Special Assistant Attorney General, then appearing for Defendant Allen stated to the Court that the only data available regarding deductions taken under Minn. Stat. § 290.09, Subd. 22 were those already in the record and available to the Plaintiffs/Appellants; there being no other data regarding deductions as to public or private schools or sectarian or non-sectarian schools developed or kept by the State of Minnesota in any of its departments.

DATED this 8th day of June, 1981.

/s/ William I. Kampf

WILLIAM I. KAMPF
Attorney for Plaintiffs/
Appellants
1320 North Central Life
Tower, Town Square
St. Paul, Minnesota 55101
Telephone: (612) 291-8129

Office - Supreme Court, U.S.
FILED
[illegible] STEVAS,
CLERK

No. 82-195

IN THE

Supreme Court of the United States

October Term 1982

VAN D. MUELLER and JUNE NOYES,
Petitioners,

-vs-

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

WARREN SPANNAUS
Attorney General
State of Minnesota
DOUGLAS C. BLOMGREN
Special Assistant
Attorney General
Counsel of Record
515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-3206
Counsel for Respondent
Clyde E. Allen, Jr.,
Minnesota Commissioner
of Revenue

August 31, 1982

296-7435 — Baker Publishing Co., 207 E. 4th St., St. Paul, Minn. 55101 — 296-7435

QUESTION PRESENTED

Whether a Minnesota statute violates the establishment clause of the first amendment to the United States Constitution by providing a state income tax deduction for certain expenses actually incurred by a taxpayer's dependents attending public or private school?

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IN THE

Supreme Court of the United States

October Term 1982

No. 82-195

VAN D. MUELLER and JUNE NOYES,
Petitioners,

-vs-

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

The respondent Clyde E. Allen, Jr., Minnesota Commissioner of Revenue, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is not reported but is set forth beginning at A-1 of the Petitioners' Appendix.[1] The petitioners accurately set forth the statutory and constitutional provisions involved in the case.

[1] Further references to the Petitioners' Appendix will be "Petition at A-—."

STATEMENT OF THE CASE

The petitioners seek review of a decision by the Court of Appeals for the Eighth Circuit upholding the constitutionality of Minn. Stat. § 290.09, subd. 22 (1980). That statute authorizes state income tax deductions for certain school-related expenditures made by taxpayers on behalf of their dependents. This is not the first time that tax deduction has been challenged on establishment clause grounds. A three-judge federal district court upheld the same statute in *MCLU v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978). Indeed, three of the original plaintiffs in this case were dismissed as plaintiffs because they had possessed an interest in *Roemer*.[2]

The challenged statute was originally enacted more than 25 years ago as Minn. Laws 1955, ch. 741. The only amendment to the provision was adopted in 1976. Minn. Laws 1976, ch. 37. Under the statute, a tax deduction is available to all taxpayers who incur the identified school-related expenses on behalf of dependents attending any qualifying public or non-public school in Minnesota or its bordering states. The deductible expenses identified by the statute are sufficiently numerous and varied that virtually every taxpayer-parent in Minnesota might fairly be expected to incur at least some of them. *See* Memorandum and Order, Petition at A-62 - A-66.

The broad availability of the deduction was one reason the district court and the court of appeals concluded that the Minnesota deduction was fundamentally different from the New York tax exemption struck down in *Committee for*

---

[2] Throughout this case, the respondent Commissioner of Revenue has maintained that a taxpayer action, such as MCLU v. Roemer, is necessarily a representative action barring later taxpayer actions on the same subject.

Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1975). Unlike the tax scheme considered there, the Minnesota deduction makes significant benefits available to parents of both private- and public-school children. *Nyquist*, 413 U.S. at 782, n.38, Petition at A-41.

The court of appeals distinguished the Minnesota deduction from the New York scheme for another reason. Under Minn. Stat. § 290.09, subd. 22, taxpayers are entitled to a deduction from gross income only to the extent they actually make expenditures and only up to a maximum established by the law. That is to say, the deduction is a "genuine tax deduction" which the Court in *Nyquist* expressly distinguished from the New York exemption. *Nyquist*, 413 U.S. at 790, n.49. That exemption provided benefits bearing no direct relationship to actual expenditures and, in some cases, resulted in direct payments from the state to low income parents who sent their children to private schools. Unlike the New York scheme, the Minnesota deduction was not "designed to yield a prior determined amount of tax forgiveness in exchange for performing a specific act which the state desires to encourage . . . ." *Nyquist*, 413 U.S. at 789. *See* Petition at A-41 - A-50.

The petitioners made several attempts to show that, as a practical matter, the tax deduction impermissibly advances religion. Before the district court, they submitted data which were intended to show that the majority of tax benefits extended under the facially neutral act went to parents of sectarian students. Before the court of appeals, they submitted a slightly revised analysis based upon the same data. The district court found that the statistical argument "lack[ed] credibility." Petition at A-81. The court of appeals reached a similar conclusion. Petition at A-28.

Among the errors and omissions in the petitioners' factual argument, the district court noted with particularity the failure to properly account for more than $2 million of deductible tuition payments made by parents of students in Minnesota public schools. Petition at A-75. In addition, the petitioners completely failed to account for revenue losses which may be attributable to tuition payments to secular schools outside Minnesota and the potentially enormous amounts attributable to payments by thousands of parents for such common items as gym clothes, shop class supplies, and rented band instruments. Petition at A-7 - A-8.

Ultimately, however, the court of appeals did not rest its decision on the accuracy or inaccuracy of the petitioners' data. Even accepting the petitioners' factual presentation, the court found that the deduction provides "substantial benefits" to parents of public school students as well as those of private school students. Petition at A-51 - A-52. It further found that, by way of the deduction, Minnesota merely "abstains from taxing that income which has been de[v]oted by a broad class of Minnesota citizens to their children's education." Petition at A-52. The Court concluded that such a policy is inherently neutral and satisfies the ultimate demand of the establishment clause by neither advancing nor inhibiting religion.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Conflict Between The First And Eighth Circuits Rests Upon The Facts Presented To Those Courts.

In its decision, the Eighth Circuit upheld a statute similar to one struck down in *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980). The petitioners argue that Supreme Court review is required to resolve the apparent conflict. The conflict, however, rests largely on the factual differences between the two cases and therefore requires no resolution by this Court.

The analysis supplied by both courts focused on the nature of the class of beneficiaries created by the statute before them. Both courts recognized that this Court has undertaken similar analyses in similar circumstances and has upheld those statutes which extend benefits to a broad and internally pluralistic class of beneficiaries. *Norberg*, 630 F.2d at 861, Petition at A-41.[3]

However, the two courts reached strikingly different conclusions about the nature of the classes created by the statutes. The court in *Norberg* found that the majority of taxpayers "eligible" for the deduction were those who sent their children to sectarian schools. *Id.* at 859, 861. While such a conclusion may or may not be correct under the Rhode Island law, it clearly would not be correct under the Minnesota law. As the court in this case correctly found, significant benefits are

---

[3] Compare *Board of Education v. Allen*, 392 U.S. 236 (1968) and *Everson v. Board of Education*, 330 U.S. 1 (1947) with *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1975).

available to *all* taxpayers with dependents attending elementary or secondary schools. Petition at A-45 - A-47. Consequently, while the two courts analyzed the statute before them using a similar legal framework, their different findings propelled them to different conclusions.

At the heart of the conflict between the First and Eighth Circuits is a conflict in findings of fact. Such a conflict requires no resolution by this Court. The petition for a writ of certiorari should be denied.

2. Neither The Decision Below Nor The Record Raises The Question Presented In The Petition.

As framed by the petitioners, the Question Presented is incorrect for two reasons. First, the petitioners suggest that the challenged statute provides tax deductions of specific amounts without regard to the actual expenses incurred by the taxpayer. Second, the petitioners suggest that the benefits of the tax deduction "flow overwhelmingly" to parents of children attending sectarian schools. Petition at i. As has already been indicated, *supra* at 3, the challenged deduction is a true deduction available only to the extent that covered expenses are actually incurred. More importantly, the facts of this case do not support the petitioners' position that the benefits of the deduction flow "overwhelmingly" or even "primarily" to parents of children attending sectarian schools.

Even if tuition were isolated from all other deductible expenses covered by the statute, the petitioners' factual presentations remain inadequate to show that the statute's primary benefit flows to those attending sectarian schools. As discussed above, more than $2 million in tuition payments were made in the relevant year to Minnesota public schools alone.

Further, the challenged statute permits deduction of tuition payments which are not included in that figure and for which the petitioners do not account. Petition at A-45, A-75. The inaccuracy of the issue as stated by the petitioners is even more obvious when deductible expenses other than tuition are considered. *See* Petition at A-62 - A-66. The record indicates that in the relevant year about 815,000 students attended public school and about 87,000 attended private, sectarian schools. Petition at 3-4. The total revenue loss due to non-tuition expenditures by public school students could easily equal and potentially dwarf that due to all types of deductible expenditures by sectarian school students.

The petitioners have also suggested that the Court should undertake review of this case so that it may thwart what the petitioners consider one more of many "ingenious plans" designed to aid sectarian schools in ways not yet expressly rejected by this Court. Petition at 11. The tax provision at issue, however, was first adopted in 1955. It thus predates every significant decision in the area save *Everson v. Board of Education*, 330 U.S. 1 (1947), in which this Court approved an analytically similar plan of aid to a broad class of students. Consequently, it is futile to suggest that the Minnesota deduction was intentionally crafted to evade this Court's rulings.

The challenged deduction is a genuine tax deduction available to virtually every Minnesota taxpayer with dependents attending elementary or secondary school. It is neither intended to nor does it effect the advancement of religion.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
DOUGLAS C. BLOMGREN
Special Assistant
Attorney General
Counsel of Record
515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-3206
Counsel for Respondent
Clyde E. Allen, Jr.
Minnesota Commissioner of
Revenue

Office - Supreme Court,
FILED
SEP 4 1982
ALEXANDER L. STEVA
CLERK

No. 82-195

IN THE

Supreme Court of the United States

October Term 1982

VAN D. MUELLER and JUNE NOYES,

Petitioners,

vs.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,

Respondents.

BRIEF OF RESPONDENTS BRENDA B. BECKER, ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN R. KENEFICK
BRIGGS AND MORGAN
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W-2200 First National Bank Bldg.
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Counsel for Respondents
Brenda B. Becker,
Richard C. Hollingsworth,
Marjorie Hollingsworth,
Roger DeHaan and
Dorothy DeHaan

234-7633 — Baker Publishing Co., 257 E. 6th St., St. Paul, Minn. 55101 — 234-7633

QUESTION PRESENTED FOR REVIEW

Does a Minnesota Statute, which grants a taxpayer a deduction on his state tax return, up to a certain maximum, for amounts he has paid to others for tuition, textbooks and transportation for dependents attending elementary or secondary schools, either public or nonpublic, in any way violate the Establishment Clause of the First Amendment?

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IN THE

Supreme Court of the United States

October Term 1982

No. 82-195

VAN D. MUELLER and JUNE NOYES,

Petitioners,

vs.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,

Respondents.

BRIEF OF RESPONDENTS BRENDA B. BECKER, ET AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The District Court Opinion is reported at 514 F. Supp. 998. The opinion of the Court of Appeals for the Eighth Circuit is reported at 676 F.2d 1195 and is reproduced in the Appendix to the Petition, A-1 through A-55.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S.C. §1254 (1) to review a judgment of the United States Court of Appeals for the Eighth Circuit, made and entered on April 30, 1982.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, or to petition the government for a redress of grievances."

STATUTE INVOLVED

The statute here involved is an integral part of the Minnesota State income tax laws set forth in Minnesota Statutes, Chapter 290. The law allows certain deductions from gross income to be made in determining net income which is then subject to tax. One of those deductions is found at Minnesota Statutes Chapter 290.09, Subd. 22. It allows a deduction for:

> "Subd. 22. Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident

of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenents, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature."

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This is an action challenging a Minnesota state income tax provision, Minn. Stat. §290.09 (22), as being violative of the First Amendment, as applied to the states through the Fourteenth Amendment. The respondents consist of the Minnesota Commissioner of Revenue, together with two groups of taxpayers who have children in various nonpublic schools, some of which are religiously affiliated and some which are not. These respondents have a personal stake in the outcome of this litigation in that they have claimed this limited deduction in prior years and intend to claim it in the future, if they properly qualify.

It is important to realize the indirect and remote nature of the benefits provided. The statute is neutral on its face, providing indirect benefits to *taxpayers* whose dependents attend any qualified school, public or nonpublic, religiously affiliated or not. There is no direct grant or payment from the state to the school, to the pupil or even to the taxpayer. Rather, an indirect benefit is accorded the taxpayer in the nature of an abstention from taxation. This is identical to tax deductions provided taxpayers under other statutes. Further, there is no payment of money by the state if taxable income is not present; this is not a tax credit with a mechanism for direct grant or payment in the absence of taxable income.

Not only is the payment indirect, but it is *remote*. The taxpayer must meet the following conditions to realize a benefit from this statute:

1. He must first pay others for tuition, transportation or textbooks for a dependent.
2. He may only claim a deduction for amounts up to $500 or $700 per dependent, depending upon the grade level.
3. He must *itemize* deductions (i.e., no benefit would be present for someone only claiming the standard deduction).
4. He must have a taxable net income, considering all other allowable deductions.
5. The deduction and resulting net income subject to tax must cause his income to be in a lower bracket or a lower table as set forth in Minn. Stat. §290.09, Subd. 2(c).

Quite important also is the *breadth* of the statute. It applies to taxpayers who have dependents attending *either*

public or nonpublic schools. While tuition is normally not charged to public school parents, there are cases of inter-district education where tuition is charged and hence subject to this deduction. And, the deduction is allowable for such things as private tutoring, driver's education which is part of a graduation requirement, Montessori tuition and miscellaneous expenditures, such as the rental of band instruments or physical education requirements. These amounts paid by public school parents are not insignificant. Tuition revenues received by public schools totaled over $2 million in 1978 and 1979. *See,* affidavit of Ronald Moir. Further, fees from "patrons" that a school may charge under Minn. Stat. §120.71 to §120.76 for miscellaneous items totaled $907,000.

Lastly, it is important to realize the *history* of the statute. The predecessor to this statute, Minn. Laws 1955, Chapter 741, was enacted in 1955 and provided for a deduction for tuition and transportation expenses paid to others, to a maximum of $200. The statute was in effect for 1955 and many subsequent years without any constitutional challenge.

The law was amended in 1976 to increase the deduction to $500 or $700, depending on the child's grade level. Also qualifying for the deduction was an expenditure for textbooks, excluding religious textbooks or instructional materials. In addition, "school" was defined to include only those places where a child could fulfill compulsory attendance requirements and where civil rights laws were observed. *See,* Minn. Laws, 1976, Chapter 37.

This law as amended was then subject to a federal constitutional challenge. A Three Judge Panel was convened and ultimately issued a decision in favor of the validity of the law. *See, Minnesota Civil Liberties Union, et al. v. Roemer, et al.,* 452 F.Supp. 1316 (D. Minn. 1978). Although a direct appeal to this Court was then allowable, no appeal was undertaken.

Petitioners then commenced this action in 1980, repeating the same basic challenge as in 1976, but arguing that certain facts could be discovered which were not available in 1976, which facts would show the infirmity of the law. After discovery, cross motions for summary judgment were filed. District Judge Renner upheld the state. *See*, opinion, A-56 through A-84.

The appeal followed to the Eighth Circuit, which upheld the statute, and petitioners further are here petitioning for review by this Court.

REASONS FOR NOT GRANTING THE WRIT

1. The history of the statute indicates acceptance by both the public, the Minnesota legislature and the courts over a long course of years.

As determined above, this statute was enacted in 1955 and went unchallenged until shortly after the 1976 amendment increasing the deduction. The wisdom of the deduction was thus before the public and the state legislature for many years. In addition, many important First Amendment decisions were issued by this Court dealing with various types of aids to nonpublic schools. While *Everson v. Board of Education*, 330 U.S. 1 (1947) preceded the law, cases such as *Board of Education v. Allen*, 392 U.S. 236 (1968); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) and *Meek v. Pittenger*, 421 U.S. 349 (1975) were all decided in the period 1955 to 1976. Most of these cases invalidated various types of assistance to nonpublic schools or the parents. Despite this, the Minnesota law remained in effect and without challenge. Such a history strongly indicates

that the statute meets the three-pronged test set forth in *Lemon v. Kurtzman, supra.*

Further, this history of acceptance, while certainly not as long, can be favorably compared to the history of acceptance of tax exemption for real property upheld in *Walz v. Tax Commission*, 397 U.S. 664 (1970).

Finally, it is apparent that this statute has been reviewed by (1) A Three-Judge Federal Court; (2) A single Federal Judge and (3) The Court of Appeals for the Eighth Circuit. Each of these courts has found in favor of the validity of this law. While other possibly contrary decisions were being handed down elsewhere, in particular *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980), the Minnesota courts either distinguished them or said they were in error. The consistency of the decisions interpreting this Minnesota Statute is noteworthy.

2. The statute is neutral on its face and as applied.

The clear *purpose* of this Act is secular. If a parent makes monetary expenditures for his or her child's education, such expenditures are for the good of the child, the good of the parent-child relationship and the good of society, which seeks educated persons. This could not possibly be questioned for public school parents. Neither should it be questioned for non-public school parents, who are paying for their childrens' secular education as well as, in some cases, providing an element of religious instruction.

The simple fact here is that this statute benefits this broad class of parents, regardless of where their children may attend school or whether the school is religiously affiliated or not. As Judge Renner said:

> The defendants have shown that the statute provides widely distributed tax relief. Such relief is available to all parents with dependents attending elementary and secondary schools. This is a critical element since a law does not advance religion when its benefits are neutrally and widely distributed and from which religious institutions benefit only incidentally and indirectly. *Walz*, 397 U.S. at 672-76.
> A-77-88.

In short, the legislature has recognized the constitutional right of parents to educate their children in nonpublic schools, and has accorded both public and nonpublic school parents a tax deduction for some of the expenditures relating to that education.

3. The statute does not encourage or reward parents who send their children to nonpublic schools; the primary effect does not advance religious beliefs.

Petitioners attempt to bring this case within the "encouragement and reward" language of *Nyquist*. However, the statutes are clearly different. In *Nyquist*, the statute allowed a direct tuition reimbursement for certain parents and a "tax credit" for others, depending on income levels. However, the amount of the credit was not related to the amount in fact spent for tuition but was a set amount. Under either formula, the parent received a fixed amount not necessarily related to the amount of tuition. It was this factor which caused the court to characterize the statute as an encouragement or reward for sending children to nonpublic schools. *See*, 413 U.S. at 790-791.

In essence, the *Nyquist* case voided any indirect payment mechanism which could not be viewed as a true tax deduction.

Here, this is a true tax deduction, similar to those provided other persons or classes who are deemed worthy of tax relief for some reason. Indeed, the deduction is similar to that provided a taxpayer who makes a contribution to a charity, including a religious charity. As a true tax deduction, any benefit flowing to a school or a religion is so remote and incidental that the deduction could not violate the separation of church and state.

Petitioner's "reward" argument should also be viewed in an historical context. It was addressed as early as *Walz v. Tax Commission, supra,* where in a concurring opinion, Justice Harlan set forth a dual test of *voluntarism* and *neutrality*. The essence of voluntarism is that the statute should neither encourage or discourage participation in religious life. If it does not, the voluntarism requirement is met.

This statute clearly does not encourage participation in religious life; it operates only as a deduction to a broad class of persons who are making expenditures to further the education of their children.

4. There is no serious split in the Circuits to compel review.

Petitioners make much of the apparent conflict between the decision below and *Norberg, supra.* A number of comments can be made. First, *Norberg* itself distinguished the prior case of *MCLU v. Roemer, supra,* a distinction which the Eighth Circuit found "somewhat dubious". *See,* A-25. In essence the Eighth Circuit found that *Roemer* should have been accorded greater weight by the *Norberg* court. Because *Roemer* was a Three-Judge Court decision, it should be ac-

corded almost as much weight as a decision by an appeals court. In short, *Norberg* is a minority opinion.

Second, based on facts developed in this case, the benefit to public school parents and parents of children attending non-sectarian private schools is not insignificant. As the Eighth Circuit said, ". . . we find that there are substantial benefits following to all members of the public." A-52. Thus while the statute may be identical, the factual underpinnings of the statute are different.

Third, it might be more prudent to await further Circuit court opinions in this delicate area before deciding to grant review.

CONCLUSION

The purpose of this statute is to grant limited relief to parents of elementary and secondary school children in these highly inflationary times. Relief is accorded to sectarian school parents, but it is also accorded to public school parents and to parents of children in nonpublic, non-sectarian schools. The relief is indirect and remote, *Walz v. Tax Commission, supra*, and simply cannot be said to cause the advancement of religious teaching or activity. It is neutral both on its face and as applied. The statute does not in any way violate the Establishment Clause of the First Amendment. The petition should be denied.

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Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

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Respondents.

BRIEF FOR RESPONDENTS DENNIS J. BERTHIAUME, ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a Minnesota Income Tax Statute, which grants a taxpayer a deduction from gross income for the amount he has paid to others (not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12) for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school, wherein a resident of the state may legally fulfill the state's compulsory attendance law, which is not operated for profit and which adheres to the provisions of the Civil Rights Act of 1964, with no distinction being made as to whether or not such school is public or nonpublic, and with the requirement that such "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in the state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, meet the constitutional requirements as set down by the United States Supreme Court under the Establishment Clause of the First Amendment?

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OPINIONS BELOW

(Cited in the Petition for a Writ of Certiorari.)

JURISDICTION

(Stated in the Petition for a Writ of Certiorari.)

CONSTITUTIONAL PROVISIONS

1. The First Amendment to the Constitution provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The Fourteenth Amendment to the Constitution provides in part:

> ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

The statute involved herein is part of the Minnesota Income Tax Statutes, set forth in Chapter 290, Minnesota Statutes, entitled "Income and Excise Taxes", the applicable portion thereof being § 290.09, Deductions from Gross Income, Subd. 22, which reads as follows:

> "Subd. 22. Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964[1] and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

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[1] 42 U.S.C.A. § 2000c et seq."

STATEMENT OF THE CASE

Subd. 22 of Minnesota Statutes § 290.09 is a part of the Minnesota Income Tax Statutes and has been in effect since 1955 (more than 27 years). It grants a taxpayer a deduction from gross income *for the amount he has paid to others* (up to a stated maximum for each dependent in grades K to 6 and a stated maximum for each dependent in grades 7 to 12) for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school, wherein a resident of Minnesota may legally fulfill the state's compulsory attendance laws, *without any distinction as to whether such school is public or nonpublic, religious or nonreligious.*

This statute, Subd. 22 of Minnesota Statutes § 290.09, *remained constitutionally unchallenged for more than 20 years.* In its first challenge, a three judge panel of the United States District Court for the District of Minnesota, in 1978, in the case of *MCLU v. Roemer*, 452 F.Supp. 1316 (D. Minn., 1978), upheld its constitutionality under the Establishment Clause of the First Amendment. In that case, the Court stated:

> "In our view the Minnesota law, if and when examined by the Supreme Court, will be found on the constitutional side of Jefferson's wall because the statute is neutral and neither advances nor impedes religious activity, benefits the parents of children attending both public and nonpublic schools, has received unchallenged historical acceptance, and is analogous to the long recognized practice of tax deductible contributions to religious and charitable causes by federal and state governments. Accordingly, the statute does not have the primary effect of advancing religion in violation of the Establishment Clause." (*MCLU v. Roemer*, supra at 1332)

Following this decision in *Roemer*, the law remained unchallenged until commencement of the present litigation, wherein its constitutionality was again upheld in the United States District Court for the District of Minnesota on May 13, 1981 and then, on appeal, was upheld by the United States Court of Appeals for the Eighth Circuit on April 30, 1982, in a decision which is the subject of the present Petition for a Writ of Certiorari.

It is not by mere accident that this Minnesota Tax Deduction Statute has been in existence for more than 27 years and has been constitutionally approved by every court which has considered the matter. This Tax Deduction Statute had already been in effect for more than a decade when the United States Supreme Court decisions began to carefully set forth the guidelines for constitutionality of statutes under the Establishment Clause and the Free Exercise Clause of the First Amendment: *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); and *Meek v. Pittenger*, 421 U.S. 349 (1975). As each of these important First Amendment (Establishment and Free Exercise Clauses) Decisions came down, this Minnesota Tax Deduction Statute remained unchallenged, until its first challenge in the *Roemer* decision in 1978. As each of these decisions of the United States Supreme Court was announced, this Minnesota Tax Deduction Statute was seen as continuing to meet the most recent constitutional test, just as though the United States Supreme Court had this specific statute in mind as a model for a properly drafted and administered neutral Tax Deduction Statute under the Establishment Clause of the First Amendment. This statute has continued to meet *all* of these constitutional tests,

all of these constitutional guidelines. This statute is strictly a tax deduction statute *applicable to all taxpayers*. It has a *completely secular legislative purpose*. It is *completely neutral* and does not either advance nor impede religious activity. It is *completely free of any entanglement* between government and religion. If any state statute can pass muster under the constitutional requirements laid down by the United States Supreme Court under the Establishment Clause of the First Amendment, this statute qualifies unconditionally.

In the first constitutional challenge of this statute the Court in *Roemer* confirmed its compliance with all the constitutional tests and guidelines established by the United States Supreme Court, as cited above. We now are involved in the second challenge to this statute and the Trial Court in this case, in the United States District Court for the District of Minnesota, Judge Renner, concluded as follows:

> "Plaintiffs have failed to convince the Court that *Roemer* was incorrectly decided or that there are additional facts that demonstrate the statute has the primary benefit of advancing religion. Plaintiffs' statistical argument lacks credibility by reason of omissions of serious significance. The statute is neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion. The statute is constitutional and summary judgment in favor of defendant shall be entered." (Pet. App. A-31)

On appeal, the United States Circuit Court of Appeals for the Eighth Circuit properly held that this statute was a genuine tax deduction statute, that it met the three-pronged test of *Lemon*, that it was clearly distinguishable from the statute struck down in *Nyquist* and that it met the neutrality test set forth in *Walz*. (Pet. App. A-52)

The Court below considered an apparent conflicting decision from the United States Court of Appeals for the First Circuit, *Rhode Island Federation of Teachers v. Norberg*, 630 F. 2d 855 (1st Cir. 1980). While the challenged statutes in the *Norberg* case and in this case are identical, the statistical evidence submitted and considered by the courts in each case had significant differences. The Court below, in evaluating the benefits of the Minnesota Tax Deduction Statute, found "that there are substantial benefits flowing to all members of the public". (Pet. App. A-52) The Court then stated as follows:

> "By way of deduction we conclude, as defendants urge, that the State, in effect, abstains from taxing that income which has been denoted by a broad class of Minnesota citizens to their children's education. In so doing, the State has adopted a policy which is neutral toward religion by providing a tax benefit to those parents who qualify for a deduction for expenses incurred in sending their child to school." (Pet. App. A-52)

Having made this deduction from the statistical evidence and other evidence in the record, the Court below has reached a different decision from that of the First Circuit in the *Norberg* case, but these two decisions are based on *different facts*. The Court in *Norberg* did not have sufficient facts on which to make the kind of deduction which the Court below has made, as stated above. There is no *real* conflict between the decision in *Norberg* and the decision of the Court below, only an *apparent* conflict.

REASONS FOR NOT GRANTING THE WRIT

I. There is no real conflict among the Circuit Courts of Appeal.

While the Court below was concerned with the decision of the United States Court of Appeals for the First Circuit, in the *Norberg* case, wherein the First Circuit considered and struck down a recent Rhode Island statute patterned after the Minnesota Tax Deduction Statute which is being considered in this case, and the Court below clearly thought the decision of the First Circuit Court in *Norberg* was wrong and said so, it is clear that the statistical data involved in this case was such that the Court below could easily recognize and appreciate the fact that "substantial benefits" flow from this Minnesota Tax Deduction Statute "to all members of the public". The statistical evidence and other facts available to the First Circuit Court in the *Norberg* case apparently did not support such a deduction; therefore, there is no real conflict between the decision of the Court below for the Eighth Circuit and the decision of the Court for the First Circuit in *Norberg*—there is only an *apparent* conflict. Such an apparent conflict is not sufficient reason for the United States Supreme Court to grant a Writ of Certiorari and review the decision of the Court below.

II. The decision below follows and does not conflict with prior decisions of this Court.

As set forth in the Statement of the Case, above, the decision of the Court below complies fully and completely with all of the applicable constitutional guidelines and tests set forth by the United States Supreme Court in a long and distinguished line of cases concerning the constitutionality of statutes under the Establishment Clause and the Free Exercise Clause of the First Amendment. As set forth in the decision of the Court below, this Minnesota Tax Deduction Statute does not conflict with any of the decisions of the United States Supreme Court cited by Petitioners in their Petition for a Writ of Certiorari. The Court below has clearly and correctly considered each of the prior decisions of the United States Supreme Court which are applicable here and this Minnesota Tax Deduction Statute has been found to comply with the tests and guidelines established by those cases and has passed constitutional muster. The Court below has clearly and correctly set forth and applied the governing law in this case. Any "misapprehension of governing law" is strictly the plaintiffs' and not the Eighth Circuit's.

CONCLUSION

The Petitioners have failed to establish that the decision of the Eighth Circuit below, upholding the constitutionality of a portion of the Minnesota Income Tax Deduction Statutes (which challenged portion has been in effect for more than 27 years and was previously upheld by a United States District Court three judge panel, for the District of Minnesota, in 1978) is in any real conflict with the decision cited by Petitioners from the United States Court of Appeals for the First Circuit concerning a similar statute, so as to be of any real concern to this Court, and the Petitioners have failed to establish that the decision rendered by the Eighth Circuit below departs from the prior decisions of this Court relating to the constitutionality of a state statute under the Establishment Clause of the First Amendment. CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
DEC 10 1982
ALEXANDER L. STEVAS,
CLERK

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QUESTION PRESENTED FOR REVIEW

Does a Minnesota statute which provides deductions of up to $500 and $700 per child for tuition, textbook and transportation payments made by parents of children attending elementary and secondary schools violate the Establishment Clause when it: (1) is disproportionately available to parents of children attending sectarian schools; (2) constitutes an unrestricted subsidy to sectarian education; (3) provides no mechanism to ensure that deductions are not taken for sectarian activity, and would require excessive entanglement if such assurance were attempted; and (4) was not motivated by a secular purpose?

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OTHER AUTHORITIES

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Bittker, Churches, Taxes and the Constitution, 78 Yale L.J. 1285 (1969) 22

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OPINIONS BELOW

The District Court's opinion below is reported at 514 F. Supp. 998. The opinion of the Court of Appeals is reported at 676 F. 2d 1195. Each is also reproduced in the appendix to the Petition for a Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was granted on October 4, 1982. ____U.S.____ (1982).

CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Minn. Stat. § 290.09, subd. 22.

Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964[1] and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other

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[1] 42 U.S.C.A. § 2000c et seq.

instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

STATEMENT OF THE CASE

Minn. Stat. § 290.09, subd. 22, grants a deduction from Minnesota gross income for amounts paid by taxpayers to others for tuition, textbook and transportation expenses of dependents enrolled in kindergarten through twelfth grades. For those dependents enrolled in grades K-6, up to $500 per dependent may be deducted. For those enrolled in grades 7-12, the maximum deduction per dependent for such expenses is $700. There is no limit upon the number of dependents for whom deductions may be taken.

Tuition deductions made available under the statute are not limited to fees paid by parents for instruction in secular subjects. As set forth below in greater detail, the tuition deduction is

generally available only to parents of children in nonpublic schools, since Minnesota law forbids public schools from charging ordinary tuition except in extremely limited situations. Minn. Stat. § 120.06. Those "textbooks" for which deductions may be taken are specifically defined to include instructional materials and equipment used in the teaching of subjects customarily taught in Minnesota's public schools, and which are not used in the teaching of religious tenets, doctrines or worship. The books themselves, however, need not actually be used in public schools. In practice, expenses actually available for deduction are limited to only those textbooks and equipment not used in the public schools, because Minnesota already requires

provision of textbooks and educational aids at state expense to nonpublic school pupils to the same extent as they are made available to public school pupils under statutory programs similar to those upheld by this Court in Board of Education v. Allen, 392 U.S. 236 (1968), and its progeny. See Minn. Stat. § § 123.931 - 123.947.[2]

Transportation expenses incurred by the taxpayer are also deductible. However, transportation or textbook expenses incurred in association with extracurricular school activities are not deductible.[3] See also JA-11, 13-14, 23-24.

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[2]Moreover, Minnesota law forbids assessment of fees against public school pupils for textbooks and workbooks. Minn. Stat. § 120.74, subd. 1(a).

[3]The Minnesota Department of Revenue has determined that charges paid

Loss of revenue as a result of the statute was estimated by the Minnesota Department of Revenue in 1978 as $2.4 million per year. (JA-5). Taxpayers claiming the deduction may not also claim Minnesota's "standard deduction." See Minn. Stat. § 290.09, subd. 15. For some taxpayers, reduction of tax due is a function of mandated use of tax tables prepared by the Commissioner of Revenue. Minn. Stat. § 290.06, subd. 2c(b). The Commissioner, who has the authority to prepare the bales in increments of $100

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3 (continued)

for participation in field trips sponsored by a school as a course requirement are deductible. (JA-19). However, as is the case with regard to textbooks and workbooks, see, note 1, supra, Minnesota law forbids assessment of fees against public school students in this circumstance. Minn. Stat. § 120.74, subd. 1(c).

or less, id., has set the increments in $50 steps. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment at Attachment F, Mueller v. Allen, 514 F. Supp. 998 (D. Minn. 1981)(1980 Tax Table). Accordingly, any such taxpayer will realize a tax benefit if he or she deducts $50 or more. For taxpayers with taxable incomes of $20,000 or more, tax due is computed as a function of applicable percentage rates of taxation. Minn. Stat. § 290.06, subd. 2c. Thus, these taxpayers will realize a tax benefit under the statute if they have any amount of deductions.

Despite the apparent facial neutrality of the statute, the record makes clear that benefits actually flowing to taxpayers with children in the

public schools are extremely limited. With regard to tuition expenses, identified by the Court of Appeals as the principal benefit afforded by the statute, Minnesota public school districts are generally forbidden by law from charging tuition. Minn. Stat. § 120.06; see also Minn. Stat. § 120.72. Of the 815,155 public school pupils attending public schools during the 1978-1979 school year, only 79 pupils were assessed a tuition charge "in the ordinary sense." For the 1977-1978 school year, only 40 pupils were charged. (JA-35). These fees may be assessed as a result of a Minnesota statute authorizing such charges for pupils who attend schools in districts outside the district of their permanent

residence. Minn. Stat. § 123.39, subd. 5.[4]

On the other hand, the number of children enrolled in tuition-charging nonpublic schools in Minnesota for the 1979-1980 school year was 90,954. Over 95% of this number, or 86,808, were enrolled in schools considering themselves to be sectarian.[5] (JA-33).

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[4] It should be noted that Minnesota law authorizes the districts of residence of some of these pupils to reimburse the school district actually attended by the pupil for the costs of his or her education. Minn. Stat. § 123.39, subd. 4. Which districts actually did so, obviating the need for these pupils' parents to pay tuition, is not known.

[5] Data concerning the sectarian/nonsectarian character of subject schools is collected annually by the Minnesota Department of Education in association with administration of state aids to nonpublic schools. See MCLU v. Casmey, No. 3-76-8 (D. Minn., November 1, 1977) (Memorandum Opinion and Order).

Presumably each of these pupils incurred tuition charges. Although the record lacks evidence concerning the tuition actually charged by sectarian schools, U.S. Census Bureau figures indicate that the national average is $420 and $976 for sectarian elementary and secondary schools, respectively. See U.S. Department of Commerce, Bureau of the Census, Private School Enrollment, Tuition, and Enrollment Trends: October, 1979, at 27.

Minnesota strictly limits the fees which public schools may charge pupils for services and materials. Minn. Stat. § 120.74. Those fees which are assessed by public school districts are reported annually to the Minnesota Department of Education. Account ledgers maintained by the Department of Education for the 1978-

1979 school year indicate that monies received by public school districts for items characterizable as tuition totalled $2,005,142 (Account Code 1-10.21), JA-38, an average of $2.49 per public school student. For the same school year, the Department of Education reports that $907,204 (Account Code 1-10.38) was collected for other fees which public schools may charge. (JA-38). Not all the fees collected in these account ledgers are deductible, however, under the terms of the statute. The fees, for example, charged to Account Code 1-10.38 represent fees permitted pursuant to Minn. Stat. § § 120.71 - 120.74. (JA-38). Many of those permissible fees relate to extracurricular expenses, see Minn. Stat. § 120.73, not deductible under the terms of the statute. No data

exists which would reveal what proportion of these amounts qualify as permissible deductions, nor what portion of these amounts were actually deducted by taxpayers. (JA-45-46).

Claim for the deduction is made on the standard Minnesota State Income Tax Form M-1 and Schedule A, Itemized Deductions. See infra Appendix A. Neither form calls for line itemization of separate expenses nor information concerning the nature of the school attended by dependents. Accordingly, short of wholesale audit of all returns filed, the state has no mechanism for determining the precise proportion of sums deducted for tuition, textbook and transportation expenses. (JA-5). Similarly, the state has no method for ascertaining the precise proportion of

sums deducted on behalf of children attending nonpublic schools. (JA-6-7).

This action was commenced in the United States District Court for the District of Minnesota, Third Division, on July 1, 1980. Jurisdiction in the District Court was founded on 28 U.S.C. § § 1331, 1343, 2201, 2202 and 42 U.S.C. § 1983. Following dismissal of three of the five original plaintiffs on October 14, 1980, the court ordered entry of summary judgment in favor of respondents on May 13, 1981 and dismissed the complaint.

Appeal to the United States Court of Appeals for the Eighth Circuit followed. On April 30, 1982, the Court of Appeals affirmed the judgment of the District Court. Focussing its attention on the tuition component of the deduction, the

Court of Appeals stated: "The fundamental issue is not whether some or even a substantial benefit accures to a religious institution, but whether the principal or primary effect of the statute is to advance religion." Mueller v. Allen, 676 F.2d 1195, 1205 (8th Cir. 1982). Although arguably recognizing that "the greater number of the class benefitted" under the statute are comprised of the ten percent of taxpayer-parents of pupils attending church-related schools, the Court of Appeals held that the statute was a permissible abstention from taxation. Id.

Petitioners petitioned this Court for a Writ of Certiorari on July 29, 1982. The petition was granted on October 4, 1982. ___U.S.____(1982).

SUMMARY OF ARGUMENT

I. For purposes of constitutional analysis, this Court has discerned a critical distinction between the deductibility of certain user fees paid by a taxpayer in return for a specified service, see Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), on the one hand, and two other forms of "tax expenditures," the failure to tax an entity at all, e.g., Walz v. Tax Commission, 397 U.S. 664 (1970), or the deductibility of certain voluntary and disinterested payments in computing taxable income, e.g., I.R.C. § 170. Unlike Walz exemptions, which are an inevitable concomitant of the need to define the tax base, or a § 170 deduction, which is a legislative attempt to delegate broad discretion to

individuals concerning the allocation of social resources, tax benefits triggered by the payment of specified user fees are direct government rewards for performing a narrowly defined activity. The Court has accordingly treated deductibility of user fees as direct subsidies for the purpose of constitutional review. Committee for Public Education v. Nyquist, supra; Sloan v. Lemon, 413 U.S. 825 (1973).

IIA. Minnesota attempts to defend its tuition deduction statute as a "neutral" tax deduction within the meaning of Walz, arguing that it can be distinguished from the tax benefits struck down in Nyquist because of the broad availability of its deductions to both public and parochial schoolchildren. However, as conceded by the Minnesota Department of Revenue in a

1976 analysis provided to the legislature shortly before the maximum tuition deduction limits were increased, in practice, the tuition deduction law benefits only those taxpayers with children in nonpublic schools. Minnesota public schools are forbidden by law from charging tuition; fewer than ten percent of school age children attend nonpublic schools, and more than ninety-six percent of those attend sectarian schools. Since the benefits of the tuition deduction are disproportionately and overwhelmingly skewed in favor of parents of children in pervasively sectarian schools, the deductions are unconstitutional. Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Education v. Nyquist, supra; Sloan v. Lemon, supra.

IIB. Even if the benefits of the Minnesota statute were equally available to children in public and nonpublic schools, the statute would be invalid as an establishment of religion, since it constitutes the provision of unrestricted funds to sectarian elementary or secondary schools. This Court has consistently struck down such unrestricted aid. E.g., Lemon v. Kurtzman, supra; Committee for Public Education v. Nyquist, supra; Sloan v. Lemon, supra; Meek v. Pittenger, 421 U.S. 349 (1975).

IIC. Even if Minnesota attempted, as it has not, to cure the problems inherent in its unrestricted subsidy to sectarian schools by a system of audits to ensure that state aid did not flow to the sectarian functions of such schools, the

statute would be invalid. Any such attempt would involve an impermissible degree of entanglement between church and state, since it would require constant monitoring to assure the secular use of state funds. Lemon v. Kurtzman, supra; Committee for Public Education v. Nyquist, supra.

III. The inclusion of textbooks and school transportation expenses within the category of expenditures which are deductible under the Minnesota statute does not render the statute constitutional.

The textbook deduction differs in critical respect from the program upheld in Board of Education v. Allen, 392 U.S. 236 (1968). Unlike the law upheld in Allen, the "textbooks" for which deductions are available in

Minnesota are selected by sectarian schools (or parents with children at those schools) without any designation or approval by public school authorities; are available to sectarian schoolchildren on terms far more favorable than to public schoolchildren; and include educational equipment, whose provision to sectarian schoolchildren has been repeatedly struck down. Wolman v. Walter, 433 U.S. 229 (1977).

Finally, the Minnesota statute's transportation deduction must also be struck down. Because it goes beyond the benefits upheld in Everson v. Board of Education, 330 U.S. 1 (1947), authorizing benefits for field trip transportation, it is unconstitutional under Wolman v. Walter, supra.

ARGUMENT

Introductory Statement

This case poses fundamental questions concerning, first, the extent to which the grant of a tax benefit implicates constitutional limitations on government power, and second, the extent to which government may channel financial assistance to sectarian education. Little attempt was made in the courts below to analyze the two questions separately. Petitioners respectfully suggest, however, that the Establishment Clause issue posed by Minnesota's attempt to permit parents to deduct tuition payments to sectarian schools in computing their taxable income can best be approached after first considering the general relationship between tax benefits and constitutional law.

I. TAX BENEFITS KEYED TO THE PAYMENT OF USER FEES FOR THE PROVISION OF SERVICES MUST BE VIEWED, FOR THE PURPOSES OF CONSTITUTIONAL ANALYSIS, AS A GOVERNMENT SUBSIDY OF SUCH SERVICES.

Tax benefits are broadly divisible into at least three categories: (1) the failure to tax at all, e.g., Walz v. Tax Commissioner, 397 U.S. 664 (1970); (2) the deductibility of certain voluntary payments in computing taxable income, e.g., I.R.C. § 170, see Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980), cert. granted, ____ U.S. ____ (1982), currently pending as No. 81-3[6]; and (3) the deductibility, in computing taxable income, of certain user fees paid by taxpayers in return

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[6]Deductibility of voluntary payments may take the form of a dollar-for-dollar credit against taxes

for a specified service, e.g., Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), aff'd mem. sub. nom. Grit v. Wolman, 413 U.S. 901 (1973); Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3rd Cir.), aff'd mem., 442 U.S. 907 (1979).[7]

Tax benefits keyed to the payment of user fees for specified services are

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6 (continued)

payable or a deduction from gross income in computing taxable income. Under a progressive tax system, credits will yield the same economic benefit regardless of tax bracket, while the precise value of deductions from gross income will vary with the taxpayer's tax bracket.

[7]As with benefits keyed to voluntary payments, the deductibility of user fees may take the form of a dollar-for-dollar credit against taxes

dramatically different from Walz exemptions or § 170 deductions. Unlike a Walz exemption, which is an inevitable concomitant of the need to define the tax base,[8] or a § 170 deduction, which is an attempt to delegate broad discretion

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7 (continued)

payable or a deduction from gross income in computing taxable income. The Minnesota statute at issue in this case provides for a deduction from gross income. Minn. Stat. § 290.09, subd. 1. The statute at issue in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) provided for a partial tax credit which varied according to a taxpayers's gross income.

[8]See Bittker, Churches, Taxes and the Constitution, 78 Yale L.J. 1285, 1293-96 (1969). The argument in Walz that exemptions were subsidies rested on the assumption that the state grants dispensations from an "ideal" position of total taxation, but that assumption begs the question. It would be equally valid to assume that the state begins from an "ideal" position of zero taxation and decides what activities should be placed within its taxing ambit. Accordingly, in Walz, this Court recognized that while an

to individuals concerning the allocation of social resources,[9] tax benefits triggered by the payment of specified user fees are direct government rewards for performing a narrowly defined activity. The taxpayer acts, in part, because he anticipates and receives an equivalent benefit, not (as under § 170) out of "detached and disinterested generosity."

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8 (continued)

exemption from taxation undoubtedly confers an economic benefit on the favored activity, the inevitable task of defining the tax base by choosing to tax certain activities while refraining from the taxation of other activities is not necessarily the constitutional equivalent of a direct government payment to the favored activity.

[9]In a democracy, the great bulk of the resources marshalled by the government through the taxing power should, of course, be expended only on projects which have been democratically selected. Respect for individual decision making argues strongly, however,

The user fee deduction merely acts as a direct government subsidy of the narrowly defined favored activity. Not surprisingly, therefore, the Internal Revenue Service has repeatedly refused to permit taxpayers to deduct tutition payments to parochial schools under I.R.C. § 170. Rev. Rul. 79-99, 1979-2 C.B. 473;

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9 (continued)

for the delegation of at least a portion of society's available tax resources to individual allocation decisions. Income tax deductions for voluntary payments constitute the principal mechanism for permitting individuals to exercise a degree of decentralized decision making concerning the allocation of potentially available social resources. Bittker, Charitable Contributions: Tax Deductions or Matching Grants?, 28 Tax L. Rev. 37, 61-62 (1972); Ginsburg, The Real Property Tax Exemption of Nonprofit Organizations: A Perspective, 53 Temple L.Q. 291, 306-13 (1980). The essence of the deduction for voluntary contributions is, therefore, the substitution of individual for government decision making.

see generally Duberstein v. Commissioner, 363 U.S. 278 (1960); Oppewall v. Commissioner, 468 F.2d 1000 (1st Cir. 1972); Winters v. Commissioner, 468 F.2d 778 (2d Cir. 1972).[10]

Since tax benefits keyed to the payment of user fees so obviously consitute a government subsidy of the favored activity, this Court has uniformly treated user fee deductions as direct subsidies for the purpose of

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[10]See also Gottlieb v. Commissioner of Taxation, 310 Minn. 62, 245 N.W. 2d 244 (1976). As a matter of the Minnesota law of charitable contributions, the Minnesota Supreme Court has recognized this very distinction. In Gottlieb, the Minnesota Court was faced with the deductibility under Minnesota's analogue to I.R.C. § 170 of tuition payments made by the taxpayer to a school in return for religious training of the taxpayer's children. The Court stated:

. . .[W]e are unable to hold that a

constitutional review. Committee for Public Education v. Nyquist, supra; Sloan v. Lemon, supra; Kosydar v. Wolman, supra; Public Funds for Public Schools v. Byrne, supra; see also Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980). In Nyquist, for example, this Court invalidated a tax

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10 (continued)

> payment made not as a gift or contribution but in consideration of equal value flowing to the taxpayer is nonetheless allowable as a deduction under the statute. Such a decision would allow taxpayers to deduct payments for YMCA dues or for tuition paid to the University of Minnesota, neither of which, it seems to us, are transactions the Legislature intended to be allowed as deductions.
>
> . . .
>
> . . . To the extent that [payments] are made in consideration of valuable services being rendered to the taxpayer in exchange, the statute does not allow the deduction.

310 Minn. at 66, 245 N.W. 2d at 247.

credit keyed to the payment of private school tuition, noting that, unlike the tax exemption upheld in Walz, tuition tax credits constitute "special tax benefits." Justice Powell, writing for the Court in Nyquist, stated:

> . . . .[I]nsofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

413 U.S. at 793.[11]

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[11]In the context of a § 170 deduction, a taxpayer receives no economic quid pro quo for his contribution. Even after the tax deduction, a donor remains in an economically negative position in connection with the entire transaction. When user fees are involved, however, a taxpayer has already received an economic quid pro quo equal to the value of his payment. The tax deduction acts to subsidize the payment, leaving the taxpayer in an economically positive position in connection with the entire transaction. It is that economic benefit which constitutes a direct government subsidy.

The court below declined to apply Nyquist to invalidate Minnesota's tuition deduction program, reasoning that Minnesota's plan constituted a "neutral" tax deduction scheme which did not have the primary effect of advancing religion. 676 F.2d at 1204-05. Such an approach, however, wholly ignores the fundamental distinction between deductions for voluntary contributions and deductions for user fees. Even if the Eighth Circuit had been considering a mere state analogue of I.R.C. § 170, rather than a statute granting tax benefits for tuition payments, its analysis would have been inappropriate, since, as petitioners demonstrate infra in Point IIA, the actual availability of the Minnesota deduction is so dramatically skewed in favor of religious

activities that it would not meet the test of "neutrality" established by Walz and Widmar v. Vincent, ____ U.S. ____, 102 S. Ct. 269 (1982). The Minnesota statute is not, however, merely an analogue of I.R.S. § 170. As a "user fee deduction," it is the unconstitutional equivalent of a direct government subsidy to a specified activity -- the payment of private elementary and secondary school tuition. As such, its constitutionality must be measured accordingly. The court below appears to have been misled by footnote 49 in Nyquist, which reads:

> Since the program here does not have the elements of a genuine tax deduction, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable under the "neutrality" test in Walz.

413 U.S. at 790, n.49.

However, even assuming that a

"genuine tax deduction" might be treated differently, one does not create a "genuine tax deduction" similar to I.R.C. § 170 merely by labeling it as such. The two critical elements of the "genuine tax deduction" referred to in Nyquist are the voluntary and disinterested nature of the payments and its broad secular availability. The Minnesota statute provides neither. Instead of voluntary and disinterested payments, the Minnesota statute is keyed to the payment of a user fee for services rendered. See Winters v. Commissioner, supra and Oppewal v. Commissioner, supra. Instead of broad secular availability, the Minnesota plan is overwhelmingly skewed toward the ninety-six percent of Minnesota's nonpublic school population in sectarian

elementary and secondary schools.[12] Thus, the court below was incorrect in analyzing the Minnesota plan as a § 170 charitable deduction rather than an overt subsidy of religious education. As petitioners demonstrate, when viewed properly as the fuctional equivalent of a

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[12]See Point IIA infra. By contrast, the Nyquist Court noted that 85 percent of New York's nonpublic schools were church affiliated. 413 U.S. at 768. Minnesota's attempt to defend its plan by arguing that tuition deductions are, as a matter of theory, available to parents of public school students is mindful of Anatole France's observation that the law in its majestic equality forbids the rich as well as the poor to beg bread and sleep under the bridges of Paris. Despite respondents' lame contention to the contrary, the overwhelming bulk of parents of public school students do not pay tuition. If respondents wish to establish the broad secular availability of tuition deductions in Minnesota, they must come forward with evidence, not speculation. See infra at 45-50.

subsidy, Minnesota's plan cannot withstand Establishment Clause scrutiny.

II. MINNESOTA'S ATTEMPT TO PERMIT PARENTS TO DEDUCT A PORTION OF TUITION CHARGED BY SECTARIAN ELEMENTARY AND SECONDARY SCHOOLS IN COMPUTING TAXABLE INCOME VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT: (1) HAS A PRINCIPAL OR PRIMARY EFFECT OF AIDING RELIGIOUS ACTIVITY; (2) FOSTERS AN IMPERMISSIBLE DEGREE OF ENTANGLEMENT BETWEEN CHURCH AND STATE; AND (3) IS A PURPOSEFUL ATTEMPT TO AID RELIGIOUS SCHOOLS.

This case marks at least the eighteenth time in recent years that this Court has been confronted with attempts to channel government aid to sectarian education.[13] Despite the substantial

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[13] Everson v. Board of Education, 330 U.S. 1 (1947); Board of Education v. Allen, 392 U.S. 236 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v.

efforts of this Court and the emergence of the now familiar three-part Establishment Clause test,[14] few issues

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13 (continued)

Committee for Public Education, 413 U.S. 472 (1973); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); Roemer v. Board of Public Works, 426 U.S. 736 (1976); Wolman v. Walter, 433 U.S. 229 (1977); Committee for Public Education v. Regan, 444 U.S. 646 (1980). See also Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio), aff'd, 409 U.S. 808 (1972); Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), aff'd mem. sub nom., Grit v. Wolman, 413 U.S. 901 (1973); Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974); United Americans for Public Schools v. Franchise Tax Board, 419 U.S. 890 (1975), aff'g, No. C-73-0090 (N.D. Cal.); Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3rd Cir.), aff'd mem., 442 U.S. 907 (1979).

[14]The three-part test was first announced by the Chief Justice in his opinion for the Court in Lemon v. Kurtzman, 403 U.S. at 612-13:

> Every analysis in this area must begin with consideration of the

continue to provoke such sustained divisiveness in communities across the nation. Quarrels over state aid to parochial schools pit neighbor against neighbor along religious lines. Legislative attempts to disguise schemes patently intended to aid sectarian education breed cynicism and disrespect for the legislative process.

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14 (continued)

> cumulative criteria developed by the Court over many years. Three such tests have been gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'

Petitioners discuss the principal or primary effect issue infra at IIA and IIB; the excessive entanglement issue infra at IIC; and the secular legislative purpose issue infra at IID.

Although this Court has had to draw some difficult lines, the outlines of its Establishment Clause jurisprudence remain clear. This Court has firmly resisted attempts to provide unrestricted subsidies to sectarian elementary and secondary schools, recognizing that unrestricted payments must, of necessity, aid sectarian schools in advancing the religious mission which is their raison d'etre. E.g., Lemon v. Kurtzman, supra; Committee for Public Education v. Nyquist, supra; Levitt v. Committee for Public Education, supra; Sloan v. Lemon, supra; Meek v. Pittenger, supra. Similarly, this Court has refused to tolerate aid schemes which purport to be "neutral" but which are, in fact, thinly disguised mechanisms for channeling public funds to parochial schools. E.g., Public Funds for

Public Schools v. Marburger, supra; Public Funds for Public Schools v. Byrne, supra. Such "unrestricted subsidy" and "disproportionately religious" schemes have been found by this Court to have the "principal or primary effect" of advancing religion, within the meaning of this Court's governing test. As petitioners now show, the Minnesota statute is infirm on both grounds.

A. Deduction of Tuition Payments to Sectarian Schools in Computing Taxable Income has the Principal or Primary Effect of Advancing Religion Because it is Disproportionately Available to Parents whose Children Attend Sectarian Schools.

Minnesota's principal defense of the tuition deduction is that, since it is facially available to parents of children attending public as well as private schools, it is a "neutral" tax deduction which subsidizes education not religion

and is closer to the tax exemption upheld in Walz than to the tax credit struck down in Nyquist. Petitioners will demonstrate below that even if Minnesota's "education subsidy" were "neutrally" available, it would, nevertheless, violate the Establishment Clause as an unrestricted subsidy to religious activity. See infra at IIB. However, Minnesota's defense of its scheme fails at the outset, since it is clear that the overwhelming bulk of the benefits provided by Minnesota's tuition deduction plan flows to parents of children attending sectarian elementary and secondary schools.

The most devastating refutation of Minnesota's assurance that substantial tax benefits under the challenged statute flow to public, as well as sectarian,

school parents is found in the "Revenue Analysis" prepared by the Minnesota Department of Revenue in connection with the amendments to the tuition deduction program enacted in 1976. That document, provided to the legislature shortly before and in connection with the bill's passage, informed legislators that:

> Only those taxpayers having dependents in nonpublic elementary or secondary schools are affected by this law since tuition, transportation and textbook expenses for public school students are paid for by the school district.[15]

Given the assessment of the Department of Revenue that the tuition tax program would have little or no effect upon

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[15]A subsequent Revenue Analysis prepared upon enactment of the legislation contains the same statement. The Revenue Analysis is reproduced as Appendix A to the Brief Amici Curiae of the National Committee for Public Education and Religious Liberty et al.

public school parents, Minnesota's attempt to cloak its program as "neutral" aid to public and private education is revealed as a sham designed to shore up a patently unconstitutional program.

Of course, even without the telling concession of the Minnesota Department of Revenue, the factual context of the tuition program reveals its disproportionately religious effect.

As the record makes clear, fewer than eleven percent of Minnesota's school age children attend nonpublic schools, and therefore could be charged for ordinary tuition. (JA-26); see Minn. Stat. § § 120.06 and 120.72. Of the 88,524 pupils attending private elementary or secondary schools in 1978-79, approximately ninety-six percent (85,243) attended

sectarian schools.[16] Since the vast bulk of public school parents pay nothing for tuition, the ordinary tuition deductions are overwhelmingly available in connection with private schoolchildren, ninety-six percent of whom attend sectarian schools.

This Court has consistently invalidated statutes which funnel aid to nonpublic students under similar circumstances. E.g., Lemon v. Kurtzman, supra; Levitt v. Committee for Public Education, supra; Committee for Public Education v. Nyquist, supra; Sloan v. Lemon, supra; Marburger v. Public Funds for Public Schools, 417 U.S. 961 (1974), aff'g mem., 358 F. Supp. 29 (D.N.J.

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[16] In Nyquist, only 85% of nonpublic schools were sectarian schools. 413 U.S. at 768.

1973); United Americans for Public Schools v. Franchise Tax Board, 419 U.S. 890 (1974), aff'g mem., No. C-73-0090 (N.D. Cal.); Byrne v. Public Funds for Public Schools, 442 U.S. 907, aff'g, 590 F.2d 514 (3d Cir. 1979); Grit v. Wolman, 413 U.S. 901 (1973), aff'g mem., 353 F. Supp. 744 (S.D. Ohio 1972); Wolman v. Walter, 433 U.S. 229 (1977).

Despite the overwhelming correlation between attendance at a sectarian school and enjoyment of the tuition deduction, Minnesota argues that the theoretical availability of the deduction to the handful of children attending school out of their districts or attending special school programs renders the deduction neutral. However, the potential availability of the deduction in connection with the fewer than 100

Minnesota children who may pay school tuition to attend public school in another district cannot save a plan which, in fact, provides disproportionate aid to the parents of more than 85,000 children attending parochial schools. (JA-26). Indeed, the availability of the deduction to public school parents is nothing more than the "window dressing" described by the district court in Rhode Island Federation of Teachers v. Norberg, 479 F. Supp. 1364, 1371 (D.R.I. 1979),[17] even

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[17]A recently completed study for the tax years 1978 and 1980, undertaken and prepared by the Minnesota Department of Revenue, Research Office, reveals that $19,268,489 was deducted under § 290.09 in 1978. Minnesota Department of Revenue, Research Office, Individual Income Tax Sample: Tax Years 1978 and 1980 at 50 (July, 1982). A copy of this study is being lodged with the Clerk of this Court and submitted to opposing counsel.

From dollars deducted, subtract the amount of school expenses paid for

if one analyzes the maximum benefits theoretically available to public school parents under assumptions most favorable

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17 (continued)

nonsectarian education. Assuming that all 3,281 private nonsectarian schoolchildren for the 1978-1979 school year, JA-26, generated the full $700 deductions allowed under the challenged statute, this group took, at most, $2,296,700 in deductions. To this product, add those fees respondents indicate were paid by parents to public school districts in permissible fees for public education, $2,912,346. (JA-38). (Not all of those fees are deductible, but no data exists to determine what proportion is deductible.) Other than de minimus amounts for pencils, notebooks and the like, the sum, $5,209,046, represents the number of dollars available for deductions for expenses incurred at both nonsectarian private and public schools. The result, after subtracting these expenses from the total dollars deducted, is $14,059,443.

This latter figure represents the minimum dollars deducted by parents of schoolchildren attending religiously-affiliated schools. The amount is 73% of the dollars deducted under the statute. Conversely, the maximum proportion of dollars deducted by parents of public and private

to Minnesota's contention.[18]

Thus, for the 1978-1979 school year, petitioners have estimated that the approximately 820,000 Minnesota pupils attending nonsectarian schools generated $5.2 million in deductions, or an average of $6.35 per pupil. On the other hand,

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17 (continued)

nonsectarian schoolchildren is 27%.

These calculations are presented schematically in Appendix B to this brief, infra.

[18]For example, not all the 3,281 schoolchildren attending private nonsectarian schools during the 1978-79 school year were enrolled in grades 7-12, permitting $700, rather than $500, in deductions. Neither can it fairly be expected that all taxpayers with these expenses chose to take advantage of § 290.09 by itemizing their deductions, or that parents paying the minimal deductible fees charged by Minnesota for public school educational programs would actually deduct those sums. In addition, not all the fees paid into the state accounts are deductible under the terms of

the remaining $14.0 million in deductions were distributed among the approximately 85,000 pupils attending religiously-affiliated schools, or an average deduction of $164.71. The ratio of these differences is 26:1.

To the extent that any serious factual question exists concerning the disproportionately religious nature of

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18 (continued)

the statute. Admission fees for extra-curricular events and charges for transportation to those events are not deductible. Cf. Minn. Stat. § 120.73, subd. 1 and JA-11. Field trip charges are collectible by public schools only if the trip is not required for a class, and are, therefore, not deductible. Cf. id. and JA-19. Nor are yearbooks, class rings, graduation announcements and the like. Cf. id. and JA-19. In short, the 27% figure derived above substantially overstates the proportion of actual tax deductions taken by parents of children in public and nonsectarian private schools.

the Minnesota deduction, it seems clear that Minnesota bears the burden of production, and even the burden of persuasion, on the issue of broad secular availability for two independent reasons. First, where, as here, a challenger demonstrates the overwhelming probability that a governmental subsidy is disproportionately available to sectarian institutions, a state must do more than merely suggest the remote possibility that non-religious activities may also derive benefit from the program. In analogous settings, where challengers have demonstrated a likelihood of unconstitutional activity, this Court has consistently ruled that the production burden shifts to the state to refute the plaintiff's prima facie case. For example, when a statistical

showing of disparity in the selection of jurors has been demonstrated, this Court has required the state to produce rebuttal evidence or suffer a directed verdict. Casteneda v. Partida, 430 U.S. 482, 493-95 (1977). Similarly, in Title VII cases, when a plaintiff establishes a prima facie case of disparate treatment, this Court has shifted the production burden to the defendant and required him to come forward with a credible explanation or suffer a directed verdict. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); see also Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). In this case, petitioners demonstrated an overwhelming likelihood that Minnesota's tuition deduction plan has a disproportionate religious effect,

thereby, shifting the production burden on the issue to the state. Nothing in Minnesota's speculations about secular availability even begins to satisfy such a shifted production burden.[19]

Second, the absence of more precise evidence concerning the proportion of deductions and revenue loss attributable to parents of children in sectarian

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[19]Since Minnesota has not satisfied its shifted production burden, it is not necessary to consider the placement of the persuasion burden on the issue of broad secular effect. Petitioners suggest, however, that the persuasion burden rests with Minnesota, since a broad secular effect defense is most analogous to an affirmative defense. See, e.g., Mt. Healthy City Board of Education v. Doyle, supra. Moreover, given the substantial nature of petitioners' showing, the probabilities are such as to require a heavier burden on defendants. Compare Mt. Healthy, supra, with Texas Department of Community Affairs v. Burdine, supra. See generally Brief for Respondent, Connick v. Meyers, No. 81-1251, at 31-34.

schools is wholly attributable to the state, which has designed its program and the tax forms implementing it in such a way as to make more specific evidence unavailable without individualized discovery or audit of millions of taxpayers. Under these circumstances, as petitioners urged in the Court of Appeals, if summary judgment striking down the statute was judged impossible absent further evidentiary materials concerning the actual incidence of tax benefits, the case should have been remanded with the burden of producing additional data shifted to the state, which alone is in a position to compile it by amending the tax forms to require line itemization of deductions taken under the challenged statute. The approach taken by the Court of Appeals --

essentially to presume accrual of the statute's benefits to all state taxpayers in the absence of firmer evidence than can presently be compiled from the state's records -- prevents analysis of the challenged statute beyond its face, an approach patently inconsistent with the more penetrating analysis required by this Court's Establishment Clause jurisprudence. See, e.g., Committee for Public Education v. Nyquist, supra; Wheeler v. Barrera, 417 U.S. 402 (1974).

B. Deducting Tuition Payments to Sectarian Schools in Computing Taxable Income has the Principal or Primary Effect of Advancing Religion Because it is the Functional Equivalent of an Unrestricted Subsidy to Sectarian Elementary and Secondary Education.

Petitioners have demonstrated that Minnesota's scheme disproportionately

benefits the parents of children attending parochial schools and, thus, has the primary effect of advancing religion. However, even if the Minnesota tax benefits were "neutrally" distributed among the population as a whole, they are the constitutional equivalent of a direct government subsidy of sectarian education. Even a "neutral" government subsidy of education would be clearly invalid to the extent it resulted in the provision of unrestricted funds to sectarian elementary or secondary schools.[20] For

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[20]As Justice Black wrote in Everson:

> The "establishment of religion" clause of the First Amendment means at least this . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion.

330 U.S. at 116.

example, in Lemon v. Kurtzman, supra, this Court invalidated a fifteen percent salary supplement paid to teachers in private schools as a violation of the Establishment Clause. The payments were "neutral," since they merely matched government salary payments routinely made to all public school teachers. This Court recognized, however, that even if a government subsidy is made equally available to public as well as private schools, it will, nevertheless, violate the Establishment Clause when couched in a form which permits its use to advance the teaching of religion. Similarly, in Nyquist, eight members of this Court were agreed that an unrestricted maintenance and repair grant to sectarian elementary and secondary schools violated the Establishment Clause. The grant was

"neutral" in that the state also routinely subsidized the maintenance and repair of public schools. This Court recognized, however, that despite the even-handed availability of the subsidy to public and private schools, the subsidy violated the Establishment Clause because it was couched in a form which permited its use in connection with a sectarian school's religious mission.

Of course, when a subsidy benefits sectarian education in an institution which is not wholly permeated with religion, such as certain sectarian universities, this Court has permitted enforceable formal assurances that the subsidy will be used for secular purposes to suffice. E.g., Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Roemer v. Board of

Public Works, 426 U.S. 736 (1976). The standard of such assurance remains high, however, and when the subsidy benefits sectarian elementary and secondary schools, which, as this Court has consistently recognized, have the inculcation of religious tenets as their principal mission,[21] even a "neutral" subsidy will be upheld only if couched in a form which renders it incapable of use in connection with the school's pervasive religious mission.

Accordingly, in Lemon v. Kurtzman, supra, this Court struck down a Rhode Island statute providing salary supplements to secular teachers in sectarian schools and a Pennsylvania

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[21] See, e.g., Lemon v. Kurtzman, 403 U.S. at 610-619; Meek v. Pittenger, 429 U.S. at 366.

statute reimbursing private schools for a percentage of the teaching expenses of secular teachers on the ground that such aid raised an unacceptably high risk of subsidizing religious instruction.[22] In Committee for Public Education v. Nyquist, supra, this Court invalidated a New York statute which provided annual

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[22]This Court was careful to note in Lemon v. Kurtzman, 403 U.S. at 618, that the danger of subsidizing religion inherent in subsidizing teachers in sectarian schools was not attributable to bad faith but to the pervasive role which religion is expected to play in all facets of sectarian education:

> . . .[A] dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.

This rationale of Lemon was further summarized by the Court in Roemer v. Maryland Public Works Board, 416 U.S. 736, 748-49, 764-65 (1976).

maintenance and repair grants to private schools on the ground that the grants could be used to maintain facilities used for religious purposes. Nyquist also struck down statutes which provided for tuition reimbursements and tax credits to parents of children in private schools because they acted as an unrestricted subsidy of sectarian education. In Sloan v. Lemon, supra, this Court invalidated a Pennsylvania statute which provided reimbursements to parents of children in private school because the reimbursement constituted an unrestricted subsidy to religious schools. As the Court noted:

> Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the

> sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding all parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible.

413 U.S. at 832.

In Levitt v. Committee for Public Education, supra, this Court invalidated a New York statute which reimbursed private schools for the costs of preparing, administering and grading teacher-prepared tests because the reimbursement constituted a subsidy of an integral part of the educational process which could not readily be severed from the school's religious function. In Meek v. Pittenger, supra, this Court struck down on their face Ohio statutes which

provided for the loan of instructional materials and equipment and the provision of auxiliary services to private schools. Discussing provision of "secular" educational materials, the Court noted:

> Even though earmarked for secular purposes, when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission, state aid has the impermissible primary effect of advancing religion. Hunt v. McNair, 413 U.S. 734, 743 . . . Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.

421 U.S. at 365-66.

In Wolman v. Walter, this Court invalidated on its face an Ohio statute which sought to loan educational materials to parents and students rather

than, as forbidden by Meek, directly to private schools, noting:

> In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.

433 U.S. at 250.

The Wolman Court also invalidated an attempt to reimburse private schools for the expenses of field trips, recognizing that any aid to the general educational mission of a sectarian elementary and secondary school inevitably assists in the performance of its pervasive religious mission. 433 U.S. 253-54. See also Byrne v. Public Funds for Public Schools, 442 U.S. 907, aff'g mem., 590 F.2d 514 (3d Cir. 1979) (invalidating $1000 "personal exemption" available for each dependent attending a nonpublic elementary or secondary school in New

Jersey).

Thus, this Court has invalidated government aid to sectarian schools for field trips, instructional materials, building maintenance, teacher salaries, teacher-prepared tests, and tuition subsidies. The form in which this aid has been provided has been treated by this Court as irrelevant and properly so. Sloan v. Lemon, 413 U.S. at 831-32; Nyquist, 413 U.S. at 789-90; Wolman, 433 U.S. at 250-51; Committee for Public Education v. Regan, 444 U.S. at 657. Aid to sectarian schools has been invalidated whether cast in the form of direct grants to schools, Lemon v. Kurtzman, reimbursement to parents, Sloan v. Lemon, or partial tax credits, Nyquist. The Minnesota statute at issue in this case

permits parents to deduct their tuition payments in computing taxable income and, thus, directly subsidizes the payment of tuition to sectarian schools. Both its substance and, except in trivial respects, its form are indistinguishable from Nyquist and Sloan. Such unrestricted tuition payments inevitably support both religious and secular aspects of the schools' missions. Accordingly, just as the maintenance grants and tuition benefits in Nyquist and tuition reimbursement in Sloan constituted unrestricted aid which would inevitably assist the religious mission of a sectarian elementary or secondary school, the tuition subsidy established by the Minnesota plan has an analytically indistinguishable inevitable primary

effect of advancing the religious mission of Minnesota's sectarian schools.[23]

C. The Deductibility of Tuition Payments to Elementary and Secondary Schools in Computing Taxable Income Fosters An Impermissible Degree of Entanglement Between Church and State Since Only An Intrusive System of Tax Auditing Can Ensure That Fruits of the Scheme Are Not Utilized to Advance the Religious Mission of Sectarian Schools.

When a parent deducts parochial school tuition in computing his or her

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[23]This Court has upheld government aid to elementary and secondary religious schools only when its form has rendered it virtually impossible for use in fulfilling the school's religious mission. See generally Everson v. Board of Education, 330 U.S. 1 (1947) (bus transportation); Wolman v. Walter, 443 U.S. 229 (1977) (administering and grading standardized tests; provision of diagnostic and therapeutic services in public facilities); Committee for Public Education v. Regan, 444 U.S. 646 (1980) (administering and grading standardized tests).

taxable income, Minnesota provides a direct tuition subsidy. Committee for Public Education v. Nyquist, supra; cf., Sloan v. Lemon, supra. As petitioners have demonstrated, supra at IIB, such a direct subsidy constitutes an unrestricted cash payment to the sectarian school which is virtually certain to advance its religious mission. Such unrestricted subsidies have been consistently held violative of the Establishment Clause. Lemon v. Kurtzman, supra; Committee for Public Education v. Nyquist, supra.

It would, of course, be theoretically possible for Minnesota to impose administrative safeguards designed to minimize the possibility that the financial benefits flowing from the state to sectarian schools via the tax

deduction route were used to advance a school's religious mission. The safeguards would take the form of a comprehensive tax audit program which, unlike Minnesota's current procedures, (1) identified taxpayers deducting payments to sectarian schools; (2) assured that recipient schools segregated a pro rata share of those payments for use in purely secular endeavors; and (3) monitored schools to assure secular use of the subsidy. Such a plan, if implemented, would constitute precisely the impermissible degree of entanglement between church and state which the Chief Justice has eloquently condemned. Lemon v. Kurtzman, 403 U.S. at 622-24.

The courts below declined to recognize the danger of impermissible entanglement, asserting the procedures

required to verify the deduction would not entail any supervision of a religious institution. Mueller v. Allen, 676 F.2d 1195, 1202 (8th Cir. 1982), quoting, 514 F. Supp. 998, 1003 (D. Minn. 1981). However, the cursory audit contemplated by the courts below would verify only that payment had been made to a religious institution. It would in no way accomplish what this Court has steadfastly found necessary, namely, the assurance that state aid be used solely for secular purposes. Lemon v. Kurtzman, 403 U.S. at 602; Sloan v. Lemon, 413 U.S. at 832-32; Nyquist, 413 U.S. at 783; Meek, 421 U.S. 365-66; Wolman, 433 U.S. at 254; cf., Committee for Public Education v. Regan, 444 U.S. at

659-60.[24]. Thus, Minnesota has a choice, albeit an unhappy one: it may administer a cursory audit which must necessarily fail to assure secular use of the subsidy, or a Draconian audit in an attempt to assure secular use, but which would foster impermissible entanglement. Either choice leads to the invalidation of the tuition tax deduction as applied to payments to sectarian elementary and secondary schools. In short, as this Court has previously noted, subsidies like Minnesota's tuition deduction plan

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[24]As this Court held in Roemer v. Board of Public Works, 426 U.S. at 765, "[T]he ability of the state to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes [is] crucial to a nonentangling aid program . . ."

cannot pass between the Scylla of potential religious use and the Charybdis of impermissible entanglement. Nyquist v. Committee for Public Education, 413 U.S. at 777-78, 787-88; Wolman v. Walter, 433 U.S. at 254-55.

D. Minnesota's Attempt to Permit Parents to Deduct Tuition Payments to Elementary and Secondary Sectarian Schools is an Intentional Attempt to Channel Financial Aid to Sectarian Education and, thus, Does Not Advance a Secular Purpose.

The "secular purpose" prong of this Court's three-part test has not played a substantial role in cases dealing with government aid to parochial education. In virtually every case, the Court has accepted a legislative assertion that the statutes in question were ultimately motivated by the secular purpose of enhancing the educational welfare of

children in nonpublic schools. Wolman v. Walter, supra; Nyquist v. Committee for Public Education, supra; Lemon v. Kurtzman, supra. Petitioners do not suggest that the Minnesota legislature was not also similarly motivated. Petitioners do suggest, however, that the relaxed test of secular purpose employed by the Court overlooks a critical distinction between the "ultimate" purpose of a statute and the more immediate means intentionally used to advance that purpose. Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205 (1970). Whether or not a legislator is motivated by an ultimate secular purpose, the First Amendment forbids him or her from intentionally using state aid to religious institutions to advance that

secular purpose. For example, a legislator might well recognize that religion plays an important role in advancing the secular values of mental health, social stability and the transmission of ethical values, but the First Amendment would not countenance legislative provision of direct subsidies to religious groups merely because of that ultimate "secular purpose." Stone v. Graham, 449 U.S. 39 (1980). Valid legislative findings that church attendance reduces juvenile delinquency and drug use could not justify provision of tax funds to induce such church attendance under the First Amendment or more precisely, clothe such grants with a valid "secular purpose."

Even under the more relaxed test of

purpose the Court has employed, however, the Minnesota statute fails, since its legislative history demonstrates that § 290.09 is designed to extend a primary benefit to parents of schoolchildren attending sectarian schools.

First, § 290.09 was amended to substantially enhance the value of the deduction to parents of sectarian school students precisely to replace aid in a different statute that had been struck down on Establishment Clause grounds. As originally enacted, § 290.09 granted a uniform deduction in the amount of $200 for tuition and transportation expenses of dependents attending elementary or secondary schools. 1955 Minn. Laws, ch. 741, § 1 (19). In 1976, the statute was amended by the addition of provisions restricting the geographical area in

which deductible expenses could be incurred, adding textbooks and instructional materials as deductible expenses, and increasing the amount of allowable deductions to their present limits of $500 and $700. 1976 Minn. Laws, ch. 37, § 1. The statute was further amended, two years later, by inclusion of a provision excluding deductions for expenses associated with extracurricular activities. 1978 Minn. Laws, ch. 766, § 3.

The amendments adopted in 1976 were introduced into the Minnesota Senate as S. F. 570 on February 24, 1975. 1975 Journal of the Senate 246. Introduction of the bill followed closely upon the decision of the Minnesota Supreme Court in MCLU v. State, 302 Minn. 216, 224 N.W.2d 355 (1974). That decision struck

down on Establishment Clause grounds a Minnesota statute, 1971 Minn. Laws, ch. 944, which provided an income tax credit for tuition and textbook expenses of schoolchildren attending Minnesota nonpublic schools. Not only did the legislature increase the amount of tuition expenses which could be deducted under § 290.09 following the Minnesota Court's decision, but it also included for the first time a deduction for textbooks and instructional materials. The statutory language defining permissible textbook deductions in § 290.09 was originally formulated in Chapter 944. Cf., 1971 Minn. Laws, ch. 944, § 1, and 1976 Minn. Laws, ch. 37, § 1.

The tax deduction provided by § 290.09 had been unavailable to taxpayers

claiming tax credits. 1971 Minn. Laws, ch. 944, § 2. The fact that deduction limits under § 290.09 were increased three-fold almost immediately after the tax credit was struck down reveals that § 290.09 was not "neutral" as respondents claim, but was (as amended) intended to do precisely what ch. 944 (invalid on Establishment Clause grounds) had done.[25] The true intent of the Minnesota legislature to aid religious schools, rather than the secular purpose of aiding education generally, is further demonstrated by its refusal to permit

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[25]The credit granted under Chapter 944, $100 per pupil for 1971, was generally comparable to the tax benefit subsequently granted taxpayers claiming full $500 and $700 deductions under the tax rates in effect for the 1976 tax year. See Minn. Stat. § 290.06, subd. 2c (1976).

aid to flow to non-religious schools when certain aid to all nonpublic schools was struck down on First Amendment grounds. In 1975, the same legislature which increased deduction limits under § 290.09 enacted a statute which, inter alia, provided instructional materials, textbooks, and auxiliary aids and services to nonpublic schools. 1975 Minn. Laws, ch. 396. The law was challenged, but upheld by a three-judge district court. MCLU v. Casmey, No. 3-76-8 (D. Minn., November 30, 1976) (Memorandum Opinion filed). On direct appeal to this Court, the matter was summarily remanded with instructions to re-examine the case in light of the intervening decision in Wolman v. Walter, supra. 433 U.S. 903 (1977). The district court subsequently struck down

the program as it applied to church-related schools, but left it intact as to non-religious schools benefitting under the program. MCLU v. Casmey, supra (November 1, 1977) (Memorandum Opinion and Order filed).

In the following session, the legislature quickly enacted a bill abruptly terminating the program, with a short, one year extension for schools with less than two hundred pupils enrolled. 1978 Minn. Laws, ch. 733. Although the program was originally enacted with the stated legislative purpose that educational benefits should be shared "equitably," and that parents should be permitted "freedom of choice" in education, 1975 Minn. Laws, ch. 396, § 1, the legislature's subsequent action reveals that it was principally the

advancement of religious schools that was the legislature's true intent and design. Like Minnesota's Wolman program, struck down in Casmey, the tax deduction under challenge in this case is not "religion-blind": its intended consequence is to provide a state subsidy to religious education.

III. MINNESOTA'S ATTEMPT TO PERMIT PARENTS TO DEDUCT PAYMENTS FOR TEXTBOOKS AND TRANSPORTATION AT SECTARIAN ELEMENTARY AND SECONDARY SCHOOLS VIOLATES THE ESTABLISHMENT CLAUSE.

Petitioners have demonstrated that Minnesota's tuition tax deduction acts as an unrestricted subsidy for sectarian education. Tax deductions for payments made in connection with textbooks and transportation raise slightly different issues since this Court has upheld statutes providing for the evenhanded

reimbursement of basic transportation costs and the loan of textbooks to children in both public and parochial schools. Everson v. Board of Education, supra; Board of Education v. Allen, supra. The textbook and transportation deductions here, however, violate the Establishment Clause because, lacking the safeguards of the benefits upheld in Everson and Allen, each poses an impermissible risk of advancing religious education.

A. The Textbook Deduction

In Board of Education v. Allen, supra, this Court upheld a New York statute which required local school boards to loan copies of textbooks being used in public schools to children enrolled in parochial schools. This Court stressed the fact that, on the very

sparse record in Allen, the textbooks had not been shown to be of potential use in furthering the religious mission of the school. The Court based its presumption of secularity concerning the textbooks in large part on the fact that they were chosen by secular authorities for use in secular schools. 392 U.S. at 244-45.[26] The textbook deductions at issue in this case lack the attributes of secularity which were present in Allen, and are invalid on four independent

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[26]The Court stressed the importance of the protective role played by the public school authorities:

> Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law.

392 U.S. at 245.

grounds.

First, unlike Allen, textbooks under the Minnesota plan are purchased and provided for by the taxpayer rather than a state official. It is the taxpayer, as well, who determines which items are deductible under the terms of the statute, with no meaningful check or monitoring program undertaken by neutral state authorities. For all practical purposes, the sectarian school itself designates which textbooks are needed to supplement the educations of its pupils. See Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980).[27] Because these items are not selected from a list of textbooks approved

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[27]In upholding state funding for standardized tests in Wolman and Regan, the Court similarly stressed that the selection of testing materials was left

by ideologically neutral and disinterested state officials, as in Allen, they are not entitled to the Allen presumption of secular use. Instead, they are analytically indistinguishable from the "instructional materials and equipment" whose provision was invalidated in Meek v. Pittenger, supra, and Wolman v. Walter, supra, precisely because, inter alia, public school authorities played no role in their selection and the danger of diversion to religious use was substantial.[28]

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27 (continued)

to public authorities, not parochial schools. Wolman, 433 U.S. at 238-40; Regan, 444 U.S. at 654-56.

[28]Nor does the conclusory limitation in § 290.09 of deductible textbook expenses to only those items not "used in the teaching of religious tenets, doctrines or worship" cure these defects. This Court's precedents make

Second, and related to the first, unlike Allen, the Minnesota statute only provides deductions for books which are not also provided by the state to public schoolchildren. This is because Minnesota already has an Allen-type law requiring the provision of textbooks used in the public schools to nonpublic school pupils. Minn. Stat. § § 123.933 and 123.932, subd. 16. Accordingly, Minnesota provides an additional benefit under the challenged statute available only to nonpublic schoolchildren over and beyond what it already makes equally

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28 (continued)

clear that such formalistic assurances of secularity are not sufficient. Committee for Public Education v. Nyquist, 413 U..S. at 778; Wolman v. Walter, 433 U.S. at 249-50; Lemon v. Kurtzman, 403 U.S. at 618-19.

available to public and nonpublic schoolchildren alike. Such a benefit is not valid under Allen, and is unconstitutional under Lemon, Sloan, Nyquist. See also Members of the Jamestown School Committee v. Schmidt, 427 F. Supp. 1338 (D.R.I. 1977); Americans United for Separation of Church and State v. Benton, 413 F. Supp. 955 (D. Iowa 1975).

Third, the Minnesota plan does not confine itself to textbook deductions, but authorizes deductions for payments in connection with the provision of educational equipment and teaching aids.[29] As this Court noted in Meek v. Pittenger, 421 U.S. at 362-66, and

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[29]Instructions accompanying the 1978 and 1980 Minnesota Income Tax Form, used by taxpayers in preparing tax

reaffirmed in Wolman v. Walter, 433 U.S. at 248-51, state subsidization of aids and equipment in sectarian elementary and secondary schools creates an impermissibly high risk that the aid will be used in furtherance of the school's religious mission.

Fourth, the Minnesota statute contemplates tax deductions for books bought by parochial school students,

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29 (continued)

returns, advise, "If you have children attending a private or parochial school, you can include the amounts you spent for equipment and nonreligious instructional materials only if they are for use in a subject commonly taught in the public schools." See Appendix A infra. Respondent Allen has indicated in an internal memorandum distributed to Department of Revenue personnel that certain additional restrictions may apply to deduction of equipment costs, JA-17-22, but since taxpayers do not see this memorandum when preparing tax returns, it has no operative effect.

while, although the record is not completely clear on this point, it would appear that public schoolchildren are merely temporarily loaned their state-provided books. The identical discrimination between public and parochial school students was held unconstitutional in Public Funds for Public Schools v. Marburger, supra; see also Meek v. Pittenger, 421 U.S. at 362, n. 12.

In sum, the "textbooks" for which deductions may be taken under § 290.09 are selected by taxpayer-parents or sectarian schools without any meaningful check by ideologically neutral state officials; deductions are made available to parents of private school pupils on more favorable terms than to parents of public school pupils, and such items

include educational equipment as well as textbooks. For each of these reasons, Minnesota's textbook deduction plan falls far short of the minimum requirements of Allen and the Establishment Clause.

B. The Transportation Deduction

The Minnesota statute authorizes a deduction for transportation payments for parents of both public and private school students. Because other statutes make clear that school transportation, where provided, must be provided on an equal basis, the tax deduction for routine transportation expenses is analogous to the direct reimbursement plan upheld in Everson.[30]

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[30] See Minn. Stat. § 123.78.

However, the tax deduction statute goes further. It is not limited, as was the statute upheld in Everson, to transportation to and from school; it authorizes deductions for field trip transportation as well. (JA-19). As this Court held in Wolman v. Walter, supra, state subsidy of sectarian school field trip expenses creates an impermissible risk of aiding the school's religious mission. Since no mechanism exists to differentiate between constitutional and unconstitutional transportation deductions, the transportation deduction must be invalidated.[31]

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[31]Even were the Court to decide that the transportation deduction is not invalid because it covers field trip transportation, the question remains whether the transportation deduction is

31 (continued)

severable, assuming, as we have shown, that the tuition and textbook deductions are infirm. For the reasons set forth by the First Circuit in Rhode Island Federation of Teachers v. Norberg, 630 F.2d at 862-63, the transportation deduction should be held not severable. However, the Court may well choose to leave the question to the District Court. See Sloan v. Lemon, 413 U.S. at 825-26; Meek v. Pittenger, 421 U.S. at 349, n.2.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the judgment of the Court of Appeals be reversed, and Minn. Stat. § 290.09, subd. 22, be declared invalid as an unconstitutional establishment of religion.

Respectfully submitted,

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[APPENDIX A]

FORM M-1

1980 MINNESOTA Income Tax Return

Before you begin, read "Use of Information" in the instructions.

Please Print or Type

Your Full First Name and Initial	Last Name(s)	Your Social Security Number	Check box and fill in name of Minnesota city or township where you lived in 1980 ☐ City ☐ Township
Spouse's Full First Name and Initial		Spouse's Social Security Number	County / Occupation Number: You / Spouse
Present Home Address (number and street, apartment number, or rural route)			Fill in your former name, address or marital status if changed since you sent in your 1979 return:
City, Town or Post Office	State	Zip Code	Date of change:

7 ☐ Check this box if you are married 8 ☐ Check this box if your spouse is filing a separate form

Check only if one of these applies: 9 ☐ Nonresident Full Year 10 ☐ Resident Part Year

STATE ELECTIONS CAMPAIGN FUND
Check a box for you and a box for your spouse. Dependents 18 and older who are not filing their own forms may also contribute by checking a box and signing below.

	Democratic Farmer-Labor	Independent Republican	American Party	Minor Party		General State Campaign Fund	No Contribution
You	11 ☐	14 ☐	17 ☐	20 ____	(Fill in the number from page 3 of the instructions)	23 ☐	26 ☐
Spouse	12 ☐	15 ☐	18 ☐	21 ____		24 ☐	27 ☐
Dependents 18 or older	13 ☐	16 ☐	19 ☐	22 ____		25 ☐	28 ☐

Staple a copy of your W-2 form here. Place your check here - please do not staple check.

		A Wife Only	B Husband, Joint Return or Single Person
1	Federal adjusted gross income (from line 31 of your Federal Form 1040 or line 11 of your Short Form 1040A. If you are not filing a Federal Return, read page 4 of the instructions)	1	
2	Federal income tax refunds you received in 1980	2	
3	Additions to your federal adjusted gross income (read instructions, page 4)	3	
4	Total (add lines 1, 2 and 3)	4	
5	Subtractions from your federal adjusted gross income (read instructions, page 5)	5	
6	Minnesota gross income (subtract line 5 from line 4)	6	
7	Federal income tax withheld from you or paid by you in 1980 (read instructions, page 6)	7	
8	Minnesota adjusted gross income (subtract line 7 from line 6)	8	
9	Total deductions (choose one method only and check the box) ☐ Standard deduction (to determine, read instructions, page 8) ☐ Itemized deductions (from line 37 of your Schedule A)	9	
10	Minnesota taxable income (subtract line 9 from line 8)	10	
11	Tax from table on page 21 of the instructions	11	
12	Total (add the amounts in columns A and B, line 11)	12	
13	Credits before tax (from line 32 on the back of this form)	13	
14	1980 income tax (subtract line 13 from line 12. Fill in this result or the amount from line 33 on the back of this form, whichever is smaller. If 13 is greater than 12, write "None.")	14	
15	Credits after tax (from line 41 on the back of this form)	15	
16	If line 15 is greater than line 14, subtract 14 from 15 and fill in result here. This is your refund.	16	
17	If you have a refund on line 16, you may donate $1 or more of your refund to the Minnesota Nongame Wildlife Fund. Fill in the amount here. This will reduce your refund.	17	
18	Subtract line 17 from line 16 and fill in **AMOUNT DUE YOU** (Read "When Will I Get My Refund" on page 16 of the instructions.)	18	
19	If you pay estimated tax, fill in the amount of your refund from line 18 that you want credited to your 1981 Estimated Tax, if any	19 ____	
20	If line 14 is greater than line 15, subtract 15 from 14 and **PAY THIS AMOUNT** (Make your check or money order out to: Commissioner of Revenue. Put your social security number on your check.)	20	

TAXPAYER—I declare under the penalties of perjury and criminal liability for willfully making a false return, that this return is true, correct and complete to the best of my knowledge and belief. I hereby confess judgment to the State of Minnesota for the amount of the tax shown due hereon, to the extent not timely paid. PREPARER—This return is true, correct and complete to the best of my knowledge and belief.

Sign Here

Your signature | Spouse's signature (if joint or combined return) | Date | ( ) Telephone number

Signature of preparer if not taxpayer | Address, City, State, Zip Code | Minn. I.D. or soc. sec. no. | ( ) Telephone number

MAIL TO: MINNESOTA INDIVIDUAL INCOME TAX ST. PAUL, MINNESOTA 55146

Itemized Deductions
Schedule A

Last Name	Social Security Number

1980

The kinds of expenses you can deduct, and the limits on how much you can deduct for certain expenses are explained in the section entitled "Deductions" in the instruction booklet.

Medical and Dental Expenses

1 Insurance premiums you paid for medical care 1
2 Medicine and drugs 2
3 Doctors, dentists, nurses, etc. . . . 3
4 Hospitals 4
5 Other (list - include hearing aids, dentures, eyeglasses, etc.)

_____ _____
_____ _____
_____ _____ 5

6 Total (add lines 1 through 5) Fill in here and on line 31 6

Taxes

7 Real estate. . . 7 _____
8 Property tax refund received in 1980. 8 _____
9 Balance (subtract line 8 from line 7). 9
10 State gasoline (read page 9 of the instruction booklet). 10
11 Sales (use federal sales tax tables) . 11
12 Minnesota car license (including wheelage tax) 12
13 Other (do not include income taxes)

_____ _____
_____ _____ 13

14 Total (add lines 9 through 13) Fill in here and on line 32 14

Interest Expense

Home loan
15 Mortgage 15
16 Contract for deed 16
17 Credit and charge cards 17
18 Other (list)

_____ _____
_____ _____
_____ _____
_____ _____ 18

19 Total (add lines 15 through 18) Fill in here and on line 33 19

Contributions

20 Cash contributions (for which you have receipts, cancelled checks, etc.) . . 20
21 Other cash contributions (list organizations and amounts)

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____ 21

22 Other than cash 22
23 Political contributions (read page 10 of the instruction booklet) . . . 23
24 Total (add lines 20 through 23) Fill in here and on line 34 24

Casualty or Theft Loss(es)

25 Casualty or theft loss(es) from line 37 of your federal Schedule A. Fill in here and on line 35 25

Miscellaneous Deductions

26 Union dues 26
27 Tax return preparation fee 27
28 Tuition, transportation, and nonreligious textbooks for dependents . . 28
29 Other (list)

_____ _____
_____ _____
_____ _____
_____ _____ 29

30 Total (add lines 26 through 29) Fill in here and on line 36 30

Total of All Itemized Deductions

31 Medical and dental 31
32 Taxes 32
33 Interest expense 33
34 Contributions 34
35 Casualty or theft loss(es) 35
36 Miscellaneous deductions 36
37 Total (add lines 31 through 36). Fill in total here and on line 9 of Form M-1 . 37

this booklet.

3) A political action committee or a committee for or against the passage of an amendment to the Minnesota Constitution.

Candidates For Minnesota State Offices

If you made a cash contribution to a Minnesota candidate for governor, lieutenant governor, attorney general, secretary of state, state treasurer, state auditor or state legislature, you may only use your cash contribution to get a direct tax credit. Read the section titled Political Contribution Credit on page 14.

Other Contributions

If you gave money to the Democratic-Farmer-Labor party, Independent Republican party, or the American party or to a Minnesota candidate for the U.S. Senate or House of Representatives or to a candidate for election as a judge in Minnesota, you may use your contribution either as a credit or as a deduction.

If you are single or if you are married and only one spouse is filing a Minnesota return, you can deduct up to $100 of the amount you contributed. If you are married and both spouses are filing, you can divide the combined total of your political contributions between you in any amounts, but the total of that deduction can be no more than $200.

Fill in the amount of your deduction for political contributions on line 23 in the section titled Contributions on your itemized deduction form.

Casualty Or Theft Losses

If you had property that was stolen or damaged by fire, storm, tornado, flood, vandalism or other similar causes, you may be able to deduct part of your loss.

If you itemized deductions on your federal Form 1040, take the amount you listed on line 29 of your federal Schedule A and fill it in on line 25 of your Minnesota itemized deduction form.

If you did not itemize deductions on your federal return, follow these steps:

1) Add $100 to the amount of insurance reimbursement you received for the loss.
2) Subtract the result from step 1 from the actual cost or decrease in market value of the property, whichever is less.
3) Fill in the remainder on line 25 of your Minnesota Schedule A. Attach a sheet of paper to your return showing how you figured your loss.

You Cannot Deduct The Value Of:

Trees, shrubs or other vegetation damaged or destroyed by disease such as dutch elm disease or oak wilt disease.

Property mislaid or lost.

Articles damaged or destroyed by moths or termites.

Dishes or glassware broken by handling or by a family pet.

Expenses you had to pay as a result of the casualty or theft. For example, the cost of moving to or renting temporary quarters, and the cost of temporary lighting or fuel expenses.

Miscellaneous Deductions

Fill in the following types of expenses in the section titled Miscellaneous Deductions on your itemized deduction form.

Education Expenses For Your Job

You Can Deduct Expenses For:

Education that helps you keep or improve skills you must have in your present job, trade, business or profession.

Education that your employer said you must have, or that the law or regulations say you must have to keep your present salary, job or professional credentials.

Traveling, meals and lodging expenses while you are away from home to obtain the type of education described above. To determine your expenses, follow the same rules used for employee business expenses in your federal income tax instruction booklet.

You Cannot Deduct Expenses For:

Education needed to meet the minimum requirements for your job, trade, business or profession. For example, you cannot deduct the cost of your college or technical education unless that education is used to keep up or improve skills in your present job, trade or business.

Education that is part of a course of study that will lead to your getting a new job, an advancement, a new trade or business or a new profession.

Grade School And High School Expenses

You can deduct up to $500 of the expenses you paid for tuition, transportation, and nonreligious textbooks for each dependent child you have in grades kindergarten through six, and up to $700 for each dependent child you have in grades seven through twelve who attend school in Minnesota, North Dakota, South Dakota, Wisconsin or Iowa.

If you have children attending a private or parochial school, you can include the amounts you spent for equipment and nonreligious instructional materials only if they are used for a subject commonly taught in the public schools.

You Can Deduct:

Tuition the school charges for private tutoring or summer school classes.

Rental fees for musical instruments, but not the purchase price if you buy instead of rent.

Expenses for required supplies for courses such as shop, home economics and art.

Expenses for required clothing for physical education classes.

Expenses for driver's education if taken for course credit.

You Cannot Deduct:

Expenses for your child to attend such extracurricular activities as sports, music, drama or speech.

Expenses you paid for your children to attend nursery schools or pre-kindergarten classes, or to attend schools after they have graduated from high school.

Expenses for your children to attend schools operated for a profit. To determine if the school is operated for a profit, you can ask the school administration.

The cost of special uniforms for choir or for school.

The cost of driving your children to school yourself.

Adoption Expenses

You can deduct up to $1,250 for certain expenses you paid in connection with adopting a child.

You can deduct attorney fees, court costs, fees you paid to adoption agencies and fees paid to obtain documents required for the adoption.

If you paid adoption expenses for a child during more than one year, you must deduct the adoption expenses in the year that you paid them. The total deduction for all years can be no more than $1,250 for each child you adopted.

You cannot deduct as an adoption expense the cost of food, clothing, lodging or medical care you provided for the child. However, you may be able to take a dependent credit for the child even before the adoption is final. You may include the cost of food, clothing, lodging and medical care you provided to the child to determine if the child qualifies as your dependent. Read, "Credit for Your Dependents," on page 13.

If you paid for medical care for the child before the adoption was final, and if the child qualified as your dependent at that time, you can include the cost of that care as a medical expense in the section titled Medical and Dental Expenses on your itemized deduction form.

Other Miscellaneous Deductions

Types Of Expenses You Can Deduct:

Dues to unions, professional organizations, chambers of commerce.

Fees you paid to have someone prepare your tax return.

Fees you paid to employment agencies or others to get a job in your present occupation.

Cost of subscriptions to professional journals.

Cost of safety equipment, uniforms, supplies and tools you must have for your job. If a tool has a useful life of more than one year, divide the cost of the tool by the number of years it is expected to last. List the result as your deduction.

Cost of business entertainment.

Necessary expenses in connection with earning or collecting income that is taxed by Minnesota, if you have not deducted the expenses elsewhere on your form.

Safety deposit box rental fees.

You Cannot Deduct:

Cost of going to and from work.

Cost of entertaining friends.

Cost of funerals, burial expenses and cemetery lots.

Cost of home repairs.

Losses from the sale of your home or your home furniture, personal automobile or other personal belongings.

Penalties, fines, or similar assessments.

LINE 10 YOUR MINNESOTA TAXABLE INCOME

Subtract your standard deduction or the total of your itemized deductions on line 9 from the amount on line 8. Fill in the result on line 10. This is your Minnesota taxable income.

LINE 11 AMOUNT FROM TAX TABLE

Turn to the tax table on page 21 of this booklet.

If the amount on line 10 of your form is less than $20,000, read down the columns in the table to find the bracket which includes your income from line 10. Fill in on line 11 the tax shown to the right of your income bracket.

If the amount on line 10 is $20,000 or more, use the tax rate schedule on the bottom of page 21 to determine your tax. Fill in the amount of your tax on line 11.

If you listed an amount for severance pay on line 5, or if you received a lump-sum distribution for pensions, follow the instructions below to determine the tax on those items. Add the result to the amount from the tax table and fill in the total on line 11.

Tax on severance pay.

1) Divide the amount of your severance pay by 10.
2) Turn to the tax table and find the tax due on the amount you determined in step 1.
3) Multiply the amount from the tax table by 10.

Add the result from step 3 to the amount of tax for the income you listed on line 10 of your form, and list the total on line 11.

Lump-sum distribution. If you used the 10-year averaging method to determine the federal tax due, use Schedule M-1LS to figure the amount of Minnesota tax to include on line 11.

LINE 12 COMBINED RETURN

If you are married and filing a combined return, add together the tax amounts in columns A and B on line 11. Fill in the total on line 12. This amount is your combined tax.

DETERMINING YOUR CREDITS

The next step is to determine whether you are eligible to take any credits.

A credit is something you subtract from your tax in order to reduce the amount you have to pay. A credit is like a deduction, except that you subtract a deduction from your income, and you subtract a credit from your tax.

There are two types of credits.

Credits before tax. You must subtract these credits from the tax you put on line 12 in order to determine the amount of your 1980 income tax. Credits before tax only reduce or

FORM M-1

1978 MINNESOTA Income Tax Return

Please Print or Type

Last Name(s)	Your First Name and Initial	Your Social Security Number	Fill in your former name, address or marital status if different from your 1977 return.
	Spouse's First Name and Initial	Spouse's Social Security Number	Date of change:
Present Home Address (number and street, apartment number, or rural route)			Check box and fill in name of Minnesota city or township where you lived in 1978. ☐ City ☐ Township
City, Town or Post Office	State	Zip Code	County / Occupation Number ___ ___ ___ You ___ Spouse

STATE ELECTIONS CAMPAIGN FUND

If you want $1 from taxes already collected to go into this fund, check one of these boxes. If you are married and both of you are filing on this form, you may each check one box. Dependents 18 and older may each check one box if they are not filing separate forms. If you have more than one dependent 18 or older, see page 3 of the instruction booklet. Dependents making this checkoff must sign here:

	Democratic Farmer-Labor	Independent Republican	American Party	General State Campaign Fund	Minor Party
You	7 ☐	10 ☐	13 ☐	16 ☐	19 ___
Spouse	8 ☐	11 ☐	14 ☐	17 ☐	20 ___
Dependents 18 or older	9 ☐	12 ☐	15 ☐	18 ☐	21 ___

(Fill in the number from the list on page 3 of the instruction booklet)

Attach the State Copy of your W-2 form here. Place your check here - please do not staple check.

Check this box if you are married 22 ☐ Check this box if your spouse is filing a separate form 23 ☐

		A Wife Only	B Husband, Joint Return or Single Person
1 Federal adjusted gross income (from line 31 of your Federal Form 1040 or line 10 of your Short Form 1040A)	1		
2 Federal income tax refunds you received in 1978	2		
3 Additions to your federal adjusted gross income	3		
4 Total (add lines 1, 2 and 3)	4		
5 Subtractions from your federal adjusted gross income	5		
6 Minnesota gross income (subtract line 5 from line 4)	6		
7 Federal income tax withheld from you or paid by you in 1978	7		
8 Minnesota adjusted gross income (subtract line 7 from line 6)	8		
9 Total deductions (choose one method only and check the box) ☐ Standard deduction (to determine, see page 8 of the instruction booklet) ☐ Itemized deductions (from line 35 of your Schedule A)	9		
10 Minnesota taxable income (subtract line 9 from line 8)	10		
11 Tax from table on page 21 of the instruction booklet	11		
12 Total (add the amounts in columns A and B, line 11)	12		
13 Credits before tax (from line 29 on the back of this form)	13		
14 1978 income tax (subtract line 13 from line 12. If line 13 is greater than 12, write None)	14		
15 Credits after tax (from line 35 on the back of this form)	15		
16 If line 14 is greater than line 15, subtract 15 from 14 and **PAY THIS AMOUNT** (Make your check or money order out to: Commissioner of Revenue. Put your social security number on your check.)	16		
17 If line 15 is greater than line 14, subtract 14 from 15 and fill in **AMOUNT OF REFUND**	17		
18 If you pay estimated tax, fill in the amount of your refund from line 17 that you want credited to your 1979 Estimated Tax, if any 18 ___			

Mail to:
Minnesota
Individual Income Tax
Centennial Office Bldg.
St. Paul, Minn. 55145

TAXPAYER—I declare under the penalties of perjury and criminal liability for willfully making a false return, that this return is true, correct and complete to the best of my knowledge and belief. I hereby confess judgement to the State of Minnesota for the amount of the tax shown due hereon, to the extent not timely paid. PREPARER— This return is true, correct and complete to the best of my knowledge and belief.

Sign Here

Your signature _____ Telephone Number _____

Spouse's signature (If joint or combined return, both must sign) _____

Signature of preparer if not taxpayer _____ Telephone Number _____

Address, City, State, Zip Code _____ Minn. Ident. No. or Soc. Sec. No. _____

Schedule A

Itemized Deductions

1973

Last Name | Your Social Security Number

The kinds of expenses you can deduct, and the limits on how much you can deduct for certain expenses are explained in the section entitled "Deductions" in the instruction booklet.

Medical and Dental Expenses

1 Payments for medical care insurance	
2 Medicine and drugs	
3 Doctors, dentists and nurses	
4 Hospital expenses	
5 Other (list) _____	
_____	
_____	
6 Total (add lines 1 through 5) Fill in here and on line 29	

Taxes

7 Real estate tax _____	
8 Property tax refund received in 1978 _____	
9 Balance (subtract line 8 from line 7)	
10 Minnesota gas tax (use federal gas tax tables)	
11 Sales tax (use federal sales tax tables)	
12 Minnesota car license (including wheelage tax)	
13 Other (do not include income taxes)	
_____	
_____	
14 Total (add lines 9 through 13) Fill in here and on line 30	

Interest Payments

15 Interest on home mortgage	
16 Charge account interest	
17 Other (list) _____	
_____	
_____	
_____	
18 Total (add lines 15 through 17) Fill in here and on line 31	

Contributions

19 Cash contributions (total from receipts, cancelled checks or other records)	
20 Other cash contributions (list organizations and amounts)	
_____	
_____	
21 Contributions other than cash	
22 Political contributions (read page 10 of the instruction booklet)	
23 Total (add lines 19 through 22) Fill in here and on line 32	

Casualty or Theft Loss(es)

24 Casualty or theft loss from line 37 of your federal Schedule A. Fill in here and on line 33	

Miscellaneous Deductions

25 Union dues	
26 Tax return preparation fee	
(27) Other (list) _____	
_____	
_____	
_____	
_____	
28 Total (add lines 25 through 27) Fill in here and on line 34	

Total of All Itemized Deductions

29 Medical and dental expenses	
30 Taxes	
31 Interest payments	
32 Contributions	
33 Casualty or theft loss(es)	
34 Miscellaneous deductions	
35 Total (add lines 29 through 34) Fill in total here and on line 9 of Form M-1	

Casualty Or Theft Losses

If you had property that was stolen or damaged by fire, storm, tornado, flood, vandalism or other similar causes, you may be able to deduct all or part of your loss.

If you itemized deductions on your federal Form 1040, take the amount you listed on line 37 of your federal Schedule A and fill it in on line 24 of your Minnesota itemized deduction form.

If you did not itemize deductions on your federal return, you will have to get a set of instructions for the federal Form 1040. Determine the amount of your loss by following the rules used for theft or casualty deductions in the federal instruction booklet.

Fill in the amount you can deduct in the section entitled Casualty or Theft Loss(es) on your itemized deductions form, and attach a separate sheet of paper to your form showing your computations.

You Cannot Deduct The Value Of:

Trees, shrubs or other vegetation damaged or destroyed by disease such as dutch elm disease or oak wilt disease.

Property mislaid or lost.

Articles damaged or destroyed by moths or termites.

Dishes or glassware broken by handling or by a family pet.

Damage or losses to business property located outside of Minnesota.

Expenses you had to pay as a result of the casualty or theft. For example, the cost of moving to or renting temporary quarters, and the cost of temporary lighting or fuel expenses.

Miscellaneous Deductions

Fill in the following types of expenses you paid in the section entitled Miscellaneous Deductions on your itemized deduction form.

Education Expenses For Your Job

You Can Deduct Expenses For:

Education that helps you keep or improve skills you must have in your present job, trade, business or profession.

Education that your employer said you must have or that the law or regulations say you must have to keep your present salary, job or professional credentials.

Traveling, meals and lodging expenses while you are away from home to obtain the type of education described above. To determine your expenses follow the same rules used for employee business expenses in your federal income tax instruction booklet.

You Cannot Deduct Expenses For:

Education needed to meet the minimum requirements for your job, trade, business or profession. For example, you cannot deduct the cost of your college or technical education unless that education is used to keep up or improve skills in your present job, trade or business.

Education that is part of a course of study that will lead to your getting a new job, an advancement, a new trade or business or a new profession.

Grade School And High School Expenses

You Can Deduct:

You can deduct up to $500 of the expenses you paid for tuition, transportation, and nonreligious textbooks for each dependent child you have in grades kindergarten through six, and up to $700 for each dependent child you have in grades seven through twelve who attend school in Minnesota, North Dakota, South Dakota, Wisconsin or Iowa.

If you have children attending a private or parochial school, you can include the amounts you spent for equipment and nonreligious instructional materials only if they are for use in a subject commonly taught in the public schools.

You Cannot Deduct:

Expenses for your child to attend such extracurricular activities as sports, music, drama, speech, or driver's education.

Expenses you paid for your children to attend nursery schools or pre-kindergarten classes, or to attend schools after they have graduated from high school.

Expenses for your children to attend schools operated for a profit. To determine if the school is operated for a profit you can ask the school administration.

Adoption Expenses

You can deduct up to $1,250 for certain expenses you paid in connection with adopting a child.

You can deduct attorney fees, court costs, fees you paid to adoption agencies and fees paid to obtain documents required for the adoption.

If you paid adoption expenses for a child during more than one year, you must deduct the adoption expenses in the year that you paid them. The total deduction for all years can be no more than $1,250 for each child you adopted.

You cannot deduct as an adoption expense the cost of food, clothing, lodging or medical care you provided for the child. However, you may be able to take a dependent credit for the child on the back of your income tax form even before the adoption is final. You may include the cost of food, clothing, lodging and medical care you provided to the child to determine if the child qualifies as your dependent.

If you paid for medical care for the child before the adoption was final, and if the child qualified as your dependent at that time, you can include the cost of that care as a medical expense in the section entitled Medical and Dental Expenses on your itemized deductions form.

Other Miscellaneous Deductions

Types Of Expenses You Can Deduct:

Dues to unions, professional organizations, chambers of commerce.

Fees you paid to have someone prepare your tax return.

Fees you paid to employment agencies to get a job.

Cost of subscriptions to professional journals.

Cost of safety equipment, uniforms, supplies and tools you must have for your job. If a tool has a useful life of more than one year, divide the cost of the tool by the number of years it is expected to last. List the result as your deduction.

Cost of business entertainment.

Necessary expenses in connection with earning or collecting income that is taxed by Minnesota, if you have not deducted the expenses elsewhere on your form.

You Cannot Deduct:

Cost of going to and from work.

Cost of entertaining friends.

APPENDIX B

Tax benefits under the statute flowing to parents of children in public and private nonsectarian schools and benefits flowing to parents of children in sectarian schools can be calculated as follows:

A. Data relating to income tax deductions under § 290.09.

1. 3,281 pupils were enrolled in nonpublic elementary and secondary schools considering themselves nonsectarian in 1978-1979. (JA-26).

2. Total payments to all Minnesota public school districts as tuition charges, including the 79 students possibly assessed tuition defined in the ordinary

sense for the 1978-1979 school year was $2,005,142. (JA-38). Total fees collected for items characterizable as textbooks or transportation for the same period was $907,204. (JA-38).

3. The amount of dollars deducted by reason of § 290.09 for the 1978 tax year is estimated at $19,268,489. Minnesota Department of Revenue, Research Office, Individual Income Sample: Tax Years 1978 and 1980, Individual Income Tax Sample: Tax Years 1978 and 1980, at 50 (July, 1982).

B. CALCULATIONS

	Calculations	Result
1.	3,281 x $700 = $2,296,700	Maximum Dollars Deducted for School Expenses at Nonpublic, Nonsectarian Schools.
2.	$2,005,142 + $907,204 = $2,912,346	Total Payments to Minnesota School Districts Potentially Available for Deduction.
3.	$2,296,700 + $2,912,346 = $5,209,046	Maximum Dollars Deducted Nonsectarian School Expenses.
4.	$19,268,489 - $5,209,046 = $14,059,443	Minimum Dollars Deducted for Sectarian School Expenses.
5.	$14,059,443 ÷ $19,268,489 = 73%	Minimum Proportion of Dollars Deducted for Sectarian School Expenses.

6. $5,209,046 ÷
$19,268,489 = 27%

Maximum Proportion of Dollars Deducted for Public and Private Nonsectarian School Expenses.

Supreme Court, U.S.
FILED
JAN 20 1983
ALEXANDER L. STEVAS
CLERK

No. 82-195

IN THE

Supreme Court of the United States

October Term 1982

VAN D. MUELLER and JUNE NOYES,
Petitioners,

v.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA E. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,
Respondents.

BRIEF FOR RESPONDENT CLYDE E. ALLEN, JR., MINNESOTA COMMISSIONER OF REVENUE

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QUESTION PRESENTED

Whether a Minnesota statute violates the establishment clause of the first amendment to the United States Constitution by providing a state income tax deduction for a broad range of expenses actually incurred by a taxpayer's dependents attending either public or private school?

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Cases:

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Committee for Public Education and Religious
Liberty v. Nyquist, 413 U.S. 756 (1973) ..... *passim*

Committee for Public Education and Religious
Liberty v. Regan,
444 U.S. 646 (1980) 9, 10, 14, 28, 30, 31

Everson v. Board of Education,
330 U.S. 1 (1947) 7, 10, 11, 12, 13, 15, 25, 33

Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Oh.
1972) *aff'd sub nom.*, Grit v. Wolman,
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Lemon v. Kurtzman,
403 U.S. 602 (1971) 5, 6, 10, 11, 12, 14, 27, 31, 32

Levitt v. Committee For Public Education and
Religious Liberty, 413 U.S. 472 (1973) 28

McDaniel v. Paty,
435 U.S. 618 (1978) 32

Meek v. Pittenger,
421 U.S. 349 (1975) 27, 31, 34

Minnesota Civil Liberties Union v. Casmey,
No. 3-76-8 (D. Minn. Nov. 30, 1976), *vacated*,
433 U.S. 903 (1977) 29

Minnesota Civil Liberties Union v. Roemer,
452 F. Supp. 1316 (D. Minn. 1978) 5, 14, 17

Minnesota Civil Liberties Union v. State,
302 Minn. 216, 224 N.W.2d 344, *cert. denied*,
421 U.S. 998 (1974) 28

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Mueller v. Allen,
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Mueller v. Allen,
676 F.2d 1195 (8th Cir. 1982) 6, 12, 17, 26
Public Funds for Public Schools v. Byrne,
590 F.2d 514 (3d Cir.), *aff'd mem.*,
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Roemer v. Board of Public Works,
426 U.S. 736 (1976) 17, 26, 32
Stone v. Graham,
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Texas Department of Community Affairs v. Burdine,
450 U.S. 248 (1981) 19
Walz v. Tax Commission,
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Washington v. Davis,
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Widmar v. Vincent,
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Winters v. Commissioner,
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Wolman v. Walter,
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Statutes and Laws:
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Minn. Stat. § 120.75 (1980) 4
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Minn. Stat. § 290.09, subd. 22 (1980)	*passim*
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1955 Minn. Laws ch. 741	2
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1976 Minn. Laws ch. 37	2
1978 Minn. Laws ch. 733, § 19	30
I.R.C. § 170	*passim*
Pub. L. No. 96-74, § 614, 93 Stat. 576 (1979)	21
Miscellaneous:	
Andrews, Personal Deductions in an Ideal Income Tax, 86 Harvard L. Rev. 2 (1972)	24
Ely, Legislative & Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970)	28
Nelson, Private Giving in America, in I Research Papers Sponsored by the Commission on Private Philanthropy and Public Needs 115 (1977)	13
Rev. Rul. 70-47, 1970-1 C.B. 49	22
Rev. Rul. 79-99, 1979-2 C.B. 473	21
Taussig, Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions, 20 National Tax Journal 1 (1967)	13
U.S. Department of Commerce, Private School Enrollment, Tuition, and Enrollment Trends: October, 1979	18

IN THE

Supreme Court of the United States

October Term 1982

VAN D. MUELLER and JUNE NOYES,
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v.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA E. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,
Respondents.

BRIEF FOR RESPONDENT CLYDE E. ALLEN, JR., MINNESOTA COMMISSIONER OF REVENUE

STATEMENT OF THE CASE

In this case, the petitioners seek a declaration that Minn. Stat. § 290.09, subd. 22 (1980) violates the establishment clause of the first amendment to the United States Constitution. That statute authorizes a Minnesota income tax deduction for certain school-related expenditures made by taxpayers on behalf of their dependents attending either public or private schools. On cross-motions for summary judgment, the district court upheld the validity of the challenged statute. That decision was affirmed by the Eighth Circuit Court of Appeals.

A. The Challenged Statute.

Minn. Stat. § 209.09, subd. 22 (1980), authorizes Minnesota taxpayers to claim income tax deductions for tuition, textbook, and transportation expenditures made on behalf of their dependents. Tax deductions of this type are not new in Minnesota. The challenged provision was originally enacted as 1955 Minn. Laws, ch. 741 and provided as follows:

> The following deductions from gross income shall be allowed in computing net income:
>
> . . . .
>
> (19) The amount he has paid to others for tuition of each dependent and the cost of transportation of each dependent in attending an elementary or secondary school; provided that the deduction for each dependent shall not exceed $200.

This provision continued in force without amendment until 1976. In that year, the maximum deduction amounts were increased from $200 to $500 for elementary school students and $700 for secondary school students. These increases did little more than adjust the original amount in response to inflation. The present version was adopted as 1976 Minn. Laws, ch. 37:

> Subdivision 1. The following deductions from gross income shall be allowed in computing net income . . .
>
> . . . .
>
> Subd. 11. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, where-

> in a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and Minnesota Statutes, Chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship.

As indicated by the above-quoted language, this deduction is not restricted to taxpayers whose dependents attend schools operated by churches or religious organizations. Rather, the deduction is available to all taxpayers who incur the described school-related expenses on behalf of dependents attending any qualifying public or nonpublic school. The expenses that may be deducted under this statute are sufficiently varied that every taxpayer in the State of Minnesota whose child attends public or private school is likely to incur some of them. In addition to regular tuition (which includes tuition paid by public schoolchildren attending school in districts other than that in which they reside), other deductible items are driver's training tuition, summer school tuition, and tuition charged by schools to tutor slow learners. Memorandum from G. Caulfield, January 7, 1980 (J.A. 23-24). The cost of basic school supplies such as paper and pens are deductible, as is the cost of gym uniforms and shoes. The cost of supplies for home economics, art and shop courses is deductible. So, too, is the rental fee for band instruments, cameras, ice skates and calculators. Memorandum from G. Caulfield, March 27,

1979 (J.A. 17-22). Finally, the cost of public bus or taxi fare incurred in transporting a child to his school is deductible. *Id.*

While public schools in Minnesota do not charge fees for some of these items, Minn. Stat. § 120.73 (1980) identifies numerous items for which fees may be charged. In addition, Minn. Stat. § 120.75 (1980) gives the State Board of Education authority to identify additional fees which may be charged. Accordingly, parents of children in public schools have substantially benefited from the statute. In 1978-1979, Minnesota residents paid more than two million dollars to public schools for tuition alone. They paid nearly one million dollars in fees to public schools during the same period. Affidavit of Ronald Moir (J.A. 38). These amounts do not even include summer school driver education tuition, tuition to schools in states bordering Minnesota, payments to nonsectarian private schools for summer school, and deductible expenses paid to those other than schools.

The deduction authorized by Minn. Stat. § 290.09, subd. 22 (1980) is claimed on the standard Minnesota individual income tax return in the same manner in which other income tax deductions are claimed by Minnesota taxpayers. For example, a taxpayer who chooses to use the state's standard deduction[1] rather than itemize deductions does not benefit from the challenged provision. Moreover, the challenged statute pertains only to actual expenses incurred and does not provide for direct grants to Minnesota residents.

The revenue loss to the State of Minnesota by reason of the challenged statute was estimated at 2.4 million dollars for the year 1978.

---

[1] Minn. Stat. § 290.09, subd. 15 (1980) provides a standard deduction equal to ten percent of a taxpayer's adjusted gross income or $2,000, whichever is least.

B. History of the Case.

Minn. Stat. § 290.09, subd. 22 was originally challenged as violating the establishment clause in *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978). The three-judge panel there upheld the statute, finding it to be a true tax deduction which does not violate the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *MCLU* decision was not appealed.

In 1980, the present action was commenced by five plaintiffs. However, early in the litigation, the district court dismissed three of the plaintiffs because they had possessed an interest in the earlier, unsuccessful challenge in *MCLU*.[2] The defendants below and respondents here are the Commissioner of Revenue of the State of Minnesota and two groups of independently represented taxpayers who intervened in support of the challenged statute.

In March, 1981, the plaintiffs, the defendant Commissioner, and the defendant intervenors brought cross-motions for summary judgment, relying largely upon information and affidavits supplied by employees of the Minnesota Department of Education and the Minnesota Department of Revenue (J.A. 5-38). On May 13, 1982, the district court denied the plaintiffs' motion, granted the defendants' motions and dismissed the complaint. In its opinion, the court rejected the plaintiffs' position that the statute benefits only a narrow class of recipients, expressly finding that "the statute provides widely distributed tax relief" to Minnesota taxpayers. *Mueller v. Allen*, 514 F. Supp. 998, 1002 (D. Minn. 1981).

---

[2] The Commissioner of Revenue has maintained throughout this litigation that the *MCLU* case was a representative taxpayer action and that the current action is barred by res judicata.

The plaintiffs appealed to the Eighth Circuit Court of Appeals which affirmed the lower court decision on April 30, 1982. Like the district court, the court of appeals specifically found that the statute provides "substantial benefits flowing to all members of the public." *Mueller v. Allen*, 676 F.2d 1195, 1205 (8th Cir. 1982).

The plaintiffs' petition to this Court for a Writ of Certiorari was granted on October 4, 1982.

SUMMARY OF ARGUMENT

The court of appeals properly applied Supreme Court precedent in upholding the Minnesota income tax deduction challenged in this case. Under the statute, Minnesota taxpayers are permitted to deduct from the computation of their taxable income that portion of their income which has been devoted to any of a broad range of educational expenses incurred by dependents attending either public or private schools within Minnesota or its bordering states. The lower courts concluded that the deduction does not violate the establishment clause of the first amendment.

The central demand of the establishment clause is neutrality. In assessing the neutrality of any state law, this Court has applied a three-prong analysis. Statutes have been upheld where they evince a secular public purpose, have a primary effect which neither advances nor inhibits religion, and do not result in the entanglement of church and state. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The controversy in this case, both in front of this Court and before the lower courts has primarily concerned the primary effect prong of the establishment test.

Since the policy to be enforced in establishment cases is neutrality, the critical concern is that religious organizations

do not receive favored or special treatment. Establishment policy does not require that religious organizations be isolated from benefits available to the general citizenry. Thus, this Court has never struck down any provision, such as the one here, which applies to the entire class of taxpayer-parents of schoolchildren. *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947).

In upholding the challenged statute, the court of appeals focused its analysis on the degree to which the statute benefits a broad and internally pluralistic class of beneficiaries, and the degree to which any benefits derived by religious institutions are passive and indirect. Unlike other tax provisions which the Court has found to be invalid, the Minnesota deduction benefits taxpayers whose children attend either public or private schools. The benefits enjoyed by taxpayers whose children attend schools with no religious affiliation are numerous and substantial. The deduction, therefore, has neither the appearance nor the practical effect of establishing a limited class entitled to favored treatment.

Both lower courts found that significant deductions were available to parents of children attending secular institutions, whether they be public or private. While the petitioners submitted factual analyses intended to prove that the practical effect of the statute was to advance religion, the courts below found the arguments unpersuasive. Not only were the analyses flawed and incomplete, they were premised upon the erroneous assumption that the constitutionality of the deduction depends upon whether, in any given year, parents of sectarian students benefit more than parents of secular students. Prior decisions of the Court have established no such rigid or arbitrary test.

Equally important is the mechanism by which benefits are extended to members of the class. The challenged deduction

is a true deduction bearing no analytical resemblance to those tuition grant programs under which the tax laws are merely a vehicle for transferring carefully calculated benefits to those attending private schools. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) [hereinafter cited as *Nyquist*]. Rather, the deduction is the constitutional equivalent of other provisions under which governments abstain from taxing either property or income which has been devoted to charitable, educational, or religious purposes. *See Walz v. Tax Commission*, 397 U.S. 664 (1970) [hereinafter cited as *Walz*]; I.R.C. § 170.

There can be little doubt that the challenged deduction possesses a valid secular purpose. The deduction is intended to increase the ability of Minnesota taxpayers to provide their children with a safe, effective, and varied education. By reducing the effect of the Minnesota income tax on taxpayers' ability to choose among various educational institutions, programs and activities, the challenged statute furthers a valid and secular state interest.

The deduction does not promote entanglement of church with state. The law engenders no administrative entanglement. Educational expenses qualify for the deduction if they are incurred by students attending any public or nonprofit institution which complies with compulsory attendance and civil rights laws. The enforcement mechanism applicable under the statute is a routine audit of individual taxpayers. Thus, the potential for entanglement is no greater than that associated with review of a charitable contribution to a purportedly religious organization or charity. I.R.C. § 170. Nor does the statute engender political entanglement. Because the state merely abstains from taxing income devoted to a particular purpose and does not extend grants of aid requiring

annual appropriations, there is little potential for the political friction generally thought to accompany such programs. Indeed, although the deduction has existed for nearly thirty years, nothing presented to the courts below suggests that it has engendered church-state entanglement.

ARGUMENT

I. MINN. STAT. § 290.09, SUBD. 22 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. Introduction.

The statute at issue here is a tax deduction available to the parents of all elementary and secondary schoolchildren. It was enacted in its original form in 1955 and has engendered no administrative or political controversy. Plaintiffs' attack on the measure rests upon their argument that the provision impermissibly benefits those parents who elect to send their children to religiously affiliated schools. They believe that any benefit accorded to these parents violates that separation of church and state demanded by the establishment clause.

The establishment clause, however, does not require strict or absolute separation of church and state. It does not require that religion be isolated from public benefits or services available to all. Rather, its central demand is that the state remain neutral toward religion, adopting neither laws which are hostile to it nor those which advance it. Thus, this Court has repeatedly rejected as practically impossible and constitutionally unnecessary the strict separation sought by those who urge isolation of religious institutions from passive and incidental state-law benefits. *Committee for Public Education*

and Religious Liberty v. Regan, 444 U.S. 646 (1980); *Wolman v. Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring); *Walz, supra*; *Everson v. Board of Education, supra.*

The rejection of strict separation has been particularly apparent in recent decisions upholding direct reimbursements to sectarian schools for the costs of taking attendance and administering state-required tests, *Committee for Public Education v. Regan, supra*, and requiring that religious groups be permitted use of university meeting rooms. *Widmar v. Vincent*, 102 S. Ct. 269 (1981). In both cases, the establishment clause was no barrier even to the active provision of benefits to religious organizations.

In cases involving tax laws, the Court has been equally reluctant to require absolute separation. In *Walz, supra*, the Court approved the "benevolent neutrality" of property tax exemptions for religious and other charitable institutions. In the same case, the Court strongly suggested the validity of section 170 of the Internal Revenue Code which provides federal income tax deductions for religious and charitable contributions. In contrast, however, the Court invalidated the special grants and equivalent tax benefits available only to a small, predominately sectarian class. *Nyquist, supra.*

While determination of what is a neutral statute has proven difficult, it is now settled that the standard to be applied is the familiar three-part test enunciated in *Lemon v. Kurtzman, supra.* A statute must (1) possess a valid secular purpose, (2) have a primary effect which neither advances nor inhibits religion, and (3) not result in excessive state entanglement with religion. In this case, the lower courts concluded that the challenged Minnesota deduction fulfilled all three requirements of this test.

Throughout this case, the second or "primary effect" test has been most clearly implicated and emphasized by the plain-

tiffs. Before this Court as well, the plaintiffs place primary emphasis on that test.

B. The Challenged Provision Does Not Violate the Primary Effect Test.

Under the second prong of the *Lemon* test, a statutory provision must have a primary effect which neither advances nor inhibits religion. The exact definition of primary effect has proved elusive. However, one element of certainty does exist within the cases. The primary effect of a statute cannot be determined by tidy statistical calculations of whether a statute occasions benefits to religious organizations which are proportionately larger than those accorded others. If a statute is otherwise neutral (1) in its scope of application and (2) in its method of operation, the statute will be upheld even if religious institutions derive substantial benefits from the statute. *Walz, supra.* Neutrality in the scope of a statute's application is determined by the breadth of the class affected by the statute. Neutrality in its operation is determined by the degree to which a statute acts passively and does not constitute an affirmative aid to religious institutions. Application of these indicia of neutrality to this case establishes that the challenged provision does meet the requirements of the primary effect test.

1. Breadth of Class.

In determining whether a statute is essentially neutral, the Court has looked to the nature of the class benefited by the statute. Where that class is broad and internally pluralistic, the statute has been found constitutional. In *Board of Education v. Allen, supra,* and *Everson v. Board of Education, supra,*

the fact that the statutorily benefited class included parents of children in either public or private schools was central to the Court's decision upholding the statutes.[3] In contrast, the Court in *Nyquist, supra*, distinguished *Allen* and *Everson* on the ground that parents of public school children were excluded from the special class of beneficiaries under a tax credit scheme. *Nyquist, supra* at 782, n.38. *See Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir.), *aff'd mem.*, 442 U.S. 907 (1979).

In this case, the challenged statute does not create a special class of beneficiaries. The class is not limited to taxpayers sending children to private school. Rather, it embraces those sending children to public or private school in Minnesota and its four bordering states. Thus, the courts below found that the statute provides widely distributed tax relief to Minnesota taxpayers. *Mueller v. Allen, supra*, 676 F.2d at 1205; *Mueller v. Allen, supra*, 514 F. Supp. at 1002.

Plaintiffs' factual argument is intended to contradict the lower courts' conclusion. Petitioners' Brief at 42, B-1. They contend that, as a practical matter, some of the benefits conferred by the deduction provide no significant benefit to parents of public school students. Thus, they argue, the class of beneficiaries under the deduction is not a broad one. Yet, even plaintiffs admit that the deduction provides some bene-

[3] The statutes at issue in *Allen* and *Everson* were drawn to apply to public and nonpublic elementary and secondary students. On the other hand, the statutes at issue in the cases on which the plaintiffs primarily rely, such as *Nyquist* and *Lemon*, applied only to nonpublic students. *See also Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3rd Cir.) *aff'd mem.*, 442 U.S. 907 (1979). As far as the defendants are aware, this is the first case since *Allen* involving a statute which extends benefits to all elementary and secondary students.

fits to those parents. Petitioners' Brief at 44. Thus, even assuming plaintiffs' factual analysis is correct, it is largely irrelevant.[4]

The challenged statute is constitutional because on its face and in practice it extends its benefits to the entire class of Minnesota taxpayers whose dependents attend elementary and secondary school. There is no authority for plaintiffs' contention that this Court should endeavor to determine the constitutionality of the challenged section by scrutinizing the particular extent to which parents whose children attend sectarian schools have claimed more income tax deductions than parents whose children attend nonsectarian schools. The Court has upheld statutes against similar constitutional attacks without entering into the type of scrutiny sought by plaintiffs. In *Walz, supra,* the Court validated the New York tax exemption without ever inquiring into whether either religious institutions, or those attending them, would receive a greater monetary benefit than other institutions or individuals. In the same case, the Court strongly suggested the constitutionality of section 170 of the Internal Revenue Code, under which well over half of the money deducted has historically been contributed directly to churches and related religious organizations.[5] Further, in *Board of Education v. Allen, supra,* and *Everson v. Board of Education, supra,* the Court found that the broad class of beneficiaries under the challenged legislation was sufficient to establish the statutes' neutrality. The Court has never indicated that it must first

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[4] As demonstrated below, however, benefits enjoyed by parents of public school students are substantial. See p. 16, *infra.*

[5] *See* Taussig, *Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions,* 20 National Tax Journal 1 (1967); Nelson, *Private Giving in America 1960-1972,* in I Research Papers Sponsored by the Commission on Private Philanthropy and Public Needs 115, 132 (1977).

determine whether students attending parochial schools would derive a larger or smaller benefit than those attending public schools. The Court has consistently maintained this approach.

In *Nyquist, supra*, for example, the Court found it critically important that the parents of public schoolchildren were excluded from benefiting under the tax credit statute. *Id.* at 782 n.38. This was true although there was no evidence in that case that tuition grants would have provided substantial benefits to the parents of public schoolchildren. Thus, in *Nyquist*, the issue was graphically framed as whether or not the statute's benefits were generally available to all similarly situated taxpayers. Only because those benefits extended to a limited and special class of taxpayers, was it necessary to scrutinize the extent to which that special class was sectarian. A similar result obtained in *Public Funds for Public Schools v. Byrne, supra*. In that case, certain benefits were available only to the narrow class of parents whose dependents attended nonpublic schools. Because that class was so narrow, detailed scrutiny was required. Indeed, the court in *Byrne* distinguished that case from *MCLU v. Roemer, supra*, precisely because of the narrowness of the class involved. *Byrne, supra*, 590 F.2d at 519 n.8.

The approach reflected in these cases is and has been warranted by sound establishment theory. When a narrow class of beneficiaries is legislatively designated, special treatment of that class is necessarily inherent in the classification. The question then becomes, in establishment cases, whether the population receiving the special treatment is predominately sectarian.[6] The concern is whether the legislature has singled

[6] This question does not end the inquiry, however. Even if there is some measure of special treatment to a narrow class, the provision may nonetheless be upheld if the extent of the special treatment is not improper. *Committee for Public Education and Religious Liberty v. Regan, supra.*

out religious organizations for favorable treatment, a concern which appropriately implicates establishment values. When there is no special designation in the legislative provision and benefits are available to all, the implication of favored treatment is not warranted. "The Establishment Clause does not prevent a state from extending the benefits of state law to all citizens without regard for their religious affiliation." *Board of Education v. Allen, supra,* 392 U.S. at 242 (citing *Everson v. Board of Education, supra,* 330 U.S. at 17).

It is not submitted that, simply because a statute on its face applies to all citizens, further inquiry is foreclosed. Certainly statutes could be constructed which, although applicable to all persons on its face, in fact apply only to a limited class. Thus, in reviewing a nominally broad classification, the test is whether the statute either explicitly or implicitly designates only a limited class. If the statute does work to specially designate a class, establishment concerns are implicated. However, no such statute is present here. Both lower courts expressly found that the statute extends substantial benefits to the entire class of taxpayers whose children attend qualifying schools. See pp. 6, 12, *supra.*

Thus, plaintiffs' request that the Court adopt a test dependent upon a determination of which group of beneficiaries statistically receives the greater tax benefit must be rejected. No such test heretofore has been used. If the Court were to adopt such a test, it is apparent that the *Walz* decision would have to be reversed and section 170 of the Internal Revenue Code struck down because religious organizations have traditionally been the prime dollar beneficiaries of tax savings measures. See n.5, *supra.* More importantly, plaintiffs offer no legal theory to support their "biggest dollar" approach to establishment clause jurisprudence. The establishment clause

requires neutrality. It does not require that religious organizations come out second best under neutral programs.

Plaintiffs, however, fare no better even under a detailed scrutiny of the financial effects of the challenged statute. In the lower courts, plaintiffs attempted to show that the practical effect of the challenged statute was to aid religious institutions. However, plaintiffs incorrectly assumed that only full-time tuition payments by students within Minnesota were deductible and ignored most items actually deductible under the challenged provision, including tuition payments of public school students and nontuition items. In fact, availability of the deduction simply is not limited to parents of those attending sectarian schools.

The Minnesota deduction extends benefits likely to be enjoyed by secular as well as sectarian students. Indeed, both lower courts expressly found that substantial benefits were derived by those sending children to public school. See p. 12, *supra*. Expenses for materials and equipment are deductible if they are (1) primarily for class rather than personal use, (2) consumed in the normal course of the class, and (3) constitute the basic minimum required expense. Thus, mundane expenditures, such as those for pencils and notebooks, are deductible. So, too, are the costs of materials for art, shop, and home economics classes. The cost of gym clothes for physical education classes is deductible. Rental fees paid to schools for a camera, a band instrument, ice skates, or a calculator are deductible. Memorandum from G. Caulfield, March 27, 1979 (J.A. 17-22). While public schools in Minnesota do not charge fees for some of these items, Minn. Stat. § 120.73 (1980) identifies numerous items for which fees may be charged. In fact, public school students paid nearly one million dollars in fees and more than two million dollars in tuition during 1978-1979. Affidavit of Ronald Moir (J.A.

38). Thus, plaintiffs' reliance on a 1976 revenue memorandum which suggests that the deduction is only of importance to private school parents is misplaced. Petitioners' Brief at 38. The 1979 memoranda referred to above are part of the record of this case, unlike the 1976 memorandum relied upon by the plaintiffs. Those memoranda show the broad scope of benefits available to public school students.[7] They demonstrate that the 1976 memorandum was incorrect in its estimation of the deduction's scope at the time it was prepared and now.

Since plaintiffs artificially selected only a limited number of available deductible items in their statistical analysis, the district court found that their argument "lack[ed] credibility by reason of omissions of serious significance." *Mueller v. Allen, supra,* 514 F. Supp. at 1003. As a result, the court rejected plaintiffs' position that the statute benefits only a narrow class and found that "the statute provides widely distributed tax relief" to Minnesota taxpayers. *Id.* at 1002. These findings should only be reversed by this Court upon a finding that they were clearly erroneous. *Roemer v. Board of Public Works,* 426 U.S. 736, 758 (1976). The record, however, strongly supports the district court's conclusions.[8]

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[7] Prepared after a three-judge federal court had already ruled the deduction constitutional, *MCLU v. Roemer, supra,* the 1979 memoranda were not intended to affect the outcome of any litigation. Instead, they were intended to guide the revenue department in applying the law.

[8] In an effort to overcome their failings before the district court, plaintiffs attempted to draw new conclusions from their data before the court of appeals. However, the calculations remained flawed by the same omissions which rendered plaintiffs' earlier arguments "not credible." As a result, the court of appeals, like the district court, rejected plaintiffs' argument and found "substantial benefits flowing to all members of the public." *Mueller v. Allen, supra,* 676 F.2d at 1205.

Before this Court, plaintiffs once again parade the same statistics arguing that they demonstrate a fatal flaw in the Minnesota deduction. Petitioners' Brief at 42-45. However, plaintiffs' calculations remain as fundamentally meaningless as when they were first presented. Plaintiffs continue to omit from their analysis deductions available for summer school tuition, tuition paid by Minnesota children attending schools in bordering states, textbook expenses, and costs borne by virtually every child attending elementary or secondary school in the state, including gym clothes, school materials, and travel expenses.[9] Plaintiffs baldly assert that the money deducted for these amounts is *de minimis*, Petitioners' Brief at 43 n.17, but they present no evidence to support this assertion. As the district court correctly found, such omissions are critical and destroy the credibility of plaintiffs' statistical analysis.

Plaintiffs, however, have made one final attempt to overcome the inadequacy of their factual argument. They contend that, even if their evidence does not establish the statute's unconstitutionality, it has shifted the burden of establishing

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[9] Plaintiffs' statistical analysis is further eroded by the most recent data on the deduction's effect which reveals that over two-thirds of those claiming deductions in 1980 did so for amounts below the national average charge for sectarian school tuition. As set forth in Petitioners' Brief at 8, the national average for tuition was $420 for sectarian elementary schools and $976 for sectarian secondary schools. U.S. Department of Commerce, Private School Enrollment, Tuition, and Enrollment Trends: October, 1979, at 27. Of the estimated 85,749 returns on which the challenged deduction was used in 1980, 58,462, or 68 percent, indicated a deduction of less than $400. More than 44,800, or about 52 percent, of the returns indicated deductions of less than $200. Nearly 30,000, or about 34 percent, of the returns showed deductions of less than $100. Minnesota Department of Revenue, Distribution of Dependent Expenses Deduction By Size of Dependent Expenses Deduction ($100 brackets) Estimated from a Sample of 1980 M-1 Returns, October 28, 1982. (Appendix A at A-1).

the statute's neutrality to the state. They suggest that they have made a prima facie showing of the "likelihood" that the statute has an impermissible primary effect. This, they assert, is sufficient to require the state to produce facts "disproving" their own faulty analysis. Their contention is unsupportable for a number of reasons. First, the findings of the district court establish that the *only* credible evidence on this issue favors the defendants. Thus, it is of no matter on whom the burden of proof rests. Second, even if one assumes their analysis to be correct, the fact that more of the revenue loss under the deduction is attributable to sectarian expenditures than to secular expenditures fails to establish any constitutional violation, prima facie or otherwise. See section I.B.2., *infra*. Third, plaintiffs rely in their analysis on Title VII cases which are completely inapposite here since the legal standard applicable to such cases is statutorily rather than constitutionally derived. *See Washington v. Davis*, 426 U.S. 229, 246-7 (1976). More relevant might be equal protection cases under which a plaintiff must demonstrate an improper purpose as well as disparate impact in order to prevail. *Id.* Under this standard, plaintiffs' challenge would surely fail, since there can be little doubt that the statute has a valid secular purpose. See section I.C., *infra*. Thus, there is no reason for the state to bear the burden of establishing the constitutional validity of the statute. Even in the Title VII cases cited by plaintiffs, "the ultimate burden of persuading the trier of fact . . . remains at all time with the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

In sum, plaintiffs' attempts to characterize the deduction as only assisting the parents of students in sectarian schools is not supported by the facts. Both on its face and as a practical matter, the statute makes available a broad class of

benefits to a broad class of taxpayers which includes parents of students in schools which are both private and public, secular and sectarian. As a result, the statute is eminently neutral and does not have the primary effect of advancing religion.

2. Passive Effect.

The second critical factor in primary effect analysis is whether any benefit the challenged statute may occasion to religious institutions is passive, or is an affirmative grant of aid. Accordingly, in *Walz, supra*, a property tax exemption for religious institutions was held constitutional because the Court found that abstention from taxation did not establish religion. Similarly, the Court in that case strongly suggested the validity of section 170 of the Internal Revenue Code which provides a federal income tax deduction for contributions to religious and charitable institutions. *Walz, supra*, 397 U.S. at 676 n.4. In *Nyquist, supra*, on the other hand, the New York tuition grant provisions were found to be an affirmative benefit. There, the state had not simply abstained from taxing income which its residents might choose to devote to a range of educational expenses. Rather, it had actually paid certain residents for having exercised that choice in a particular way.

The crucial distinction between *Walz, supra*, and section 170 on one side, and *Nyquist, supra*, on the other, lies not in the absence of any benefit to religious institutions. Some "aid" is inherent in all three programs. Rather, the distinction lies simply in the difference between active and passive "aid." The basis of this distinction cuts to the very heart of the meaning of establishment. Affirmative grants of aid, like the term "establishment" itself, denote the type of active support forbidden by the first amendment. Passive measures, on the

other hand, neither literally nor figuratively "establish." As Justice Brennan has explained, "[t]ax exemptions . . . constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy." *Walz, supra*, 397 U.S. at 691. (Brennan, J., concurring.)

Plaintiffs' contention that the Minnesota deduction is constitutionally distinct from the *Walz* exemption and the section 170 deduction is unsupportable. They choose to identify the property tax exemption as the "failure to tax at all," the deduction for contributions to churches as "decentralized" decisions concerning the "allocation of social resources," and the Minnesota deduction as "reimbursements of user fees." Petitioners' Brief at 20-24. However, plaintiffs wholly fail to explain why this classification system has any constitutional significance.

In an attempt to give their system of labels some significance, the plaintiffs suggest that establishment concerns have prompted the Internal Revenue Service to make certain "user fees" nondeductible. Petitioners' Brief at 25. This argument is both irrelevant and untrue. The Service's reasons for doing so are entirely unrelated to the establishment clause. Instead, the purpose is to distinguish "sales" from "contributions" in order to prevent false characterizations of transactions made to obtain a deduction which Congress could provide but has chosen not to provide. *See Winters v. Commissioner*, 468 F.2d 778, 780-81 (2d Cir. 1972).[10] Furthermore, some "user fees," such as pew rentals and periodic dues paid to churches, are

[10] There is even doubt whether Congress intends that contributions devoted to educational purposes be nondeductible. In the 1980 Appropriations Act, Congress prohibited enforcement of the revenue ruling designed to accomplish that result. Rev. Rul. 79-99, 1979-2 C.B. 473; Pub. L. No. 96-74, § 614, 93 Stat. 576 (1979).

deductible under section 170. Rev. Rule 70-47, 1970-1 C.B.49. Under plaintiffs' theories, deductions for these items would amount to a direct subsidy of religious worship.

Under the establishment clause, the important distinctions lie not with the system of labels urged by plaintiffs. Instead, they lie in the passive or active form of "aid" to religious institutions. In their passive effect, the *Walz* exemption, section 170 and the Minnesota deduction are indistinguishable. A deduction for payments to a religious institution, be they for purely charitable purposes or in exchange for a service provided by the religious institution, will produce some form of "aid" to that religious institution. Indeed, under section 170, a deduction is available for direct grants to churches. Those institutions plainly benefit more from direct contributions for which they must provide no service than from payments for a service which they have rendered. Thus, the Minnesota deduction for educational expenses provides benefits to religion which are even more passive and constitutionally innocuous than the section 170 deduction for direct charity to religious institutions or the *Walz* exemption for property devoted to religious purposes.

Plaintiffs are equally incorrect in their argument that the Minnesota deduction is distinct from section 170 because it unconstitutionally "rewards" or "subsidizes" individuals for a specific activity. Petitioner's Brief at 23-27. First, plaintiffs are wrong when they argue that only a narrow range of activities triggers the deduction. A broad range of educational expenses are deductible. See pp. 16-18, *supra*. Second, where property put to religious purposes is exempt from taxation, as in *Walz*, the law may be said to "subsidize" the use of property for those purposes. Similarly, section 170 may be said to "subsidize" contributions to religious organi-

zations. Yet, those tax provisions equally may be said to be a governmental effort not to "inhibit" the activities of exempt organizations. *Walz, supra,* 397 U.S. at 672-73. The Minnesota deduction is just such an effort. Under its terms, the inhibiting effect of the income tax on a taxpayer's choice of schools and programs is reduced. Its effect is at least as passive as that of section 170. Section 170, it must be emphasized, allows a deduction for direct payments to the very same religious school to which, plaintiffs claim, a deductible payment under the challenged statute would be unconstitutional.

Plaintiffs also are incorrect in their contention that the tax credit in *Nyquist, supra,* and the deduction in the instant matter are indistinguishable in their operation and effect. Petitioner's Brief at 61. At issue in *Nyquist* were two closely linked programs for making tuition grants to those attending private schools. The first was a direct grant from the state treasury to those low-income residents sending their children to nonpublic school. The second was intended to accomplish the same purpose for moderate-income taxpayers; the tuition grant was simply paid as a tax credit. The Court found the two programs inseparable. *Nyquist, supra,* 413 U.S. at 791 n.50. Thus, the distinction between the program in *Nyquist* and the deduction in this case is the distinction between an affirmative grant and an abstention from taxation. The distinction is one which the Court in *Walz* indicated was the difference between unconstitutionality and constitutionality. *Walz, supra,* 897 U.S. at 675.

Moreover, even if the tax credit in *Nyquist* could have been distinguished from the tuition grant for the purposes of constitutional analysis, it is apparent that the challenged deduction is not the theoretical or functional equivalent of the

Nyquist credit.[11] As the Court found in *Nyquist*, a tuition tax credit directly benefits religion for two reasons: (1) a credit offers the taxpayer a predetermined amount of tax forgiveness, and (2) a credit constitutes an arbitrary reduction in income. Minnesota's true deduction, however, possesses neither characteristic. First, a true deduction does not result in a predetermined amount of tax forgiveness because, unlike a credit, it does not result in a dollar for dollar rebate of funds expended. Rather, the benefit conferred by a true deduction is designed to parallel the burden placed by the tax system on those choosing among public schools, private secular schools and private sectarian schools. A progressive income tax burdens taxpayers in direct correlation to their income; those with greater income pay a larger proportion of the tax. Thus, a tax benefit designed to reduce the effect of a progressive income tax on one's ability to select a particular type of education necessarily confers benefits in proportion to the taxpayer's income. In *Nyquist*, the legislature had devised a plan designed "to assure that each family would receive a carefully estimated net benefit" regardless of income. *Nyquist*, *supra*, 413 U.S. at 790. The Minnesota legislature has devised no such plan.

Second, the Minnesota deduction does not result in arbitrary reduction of the taxpayer's income as occurred in *Nyquist*.

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[11] As a matter of tax theory, credits and deductions are often recognized to serve different purposes. The purpose of a credit, as the Court found in *Nyquist*, is to operate as an incentive. *Nyquist*, *supra*, 413 U.S. at 799. However, under one theory, the purpose of a tax deduction is not to operate as an incentive, but to assist in arriving at an equitable and realistic definition of taxable income. *See* Andrews, *Personal Deductions in an Ideal Income Tax*, 86 Harvard L. Rev. 2 (1972). It is both equitable and reasonable for Minnesota to exclude from one's taxable income those earnings devoted to education.

Rather, the deduction is designed to reduce the effect of taxes on choices among educational expenditures by conferring benefits in direct relationship to a taxpayer's actual education expenditures. The statute in *Nyquist* extended direct benefits based solely on the taxpayer's act of enrolling a child in a private school. It was "apparently designed to yield a prior-determined amount of tax forgiveness in exchange for performing a specific act . . . ." *Nyquist, supra,* 413 U.S. at 789. In substance, the tax system had been employed to actively distribute a precise benefit to those taxpayers sending children to private, predominately religious, schools.[12]

The Minnesota deduction serves no such function. Thus, even if plaintiffs could establish that the majority of the tax benefit provided by the deduction flows primarily to sectarian schoolchildren, this fact is not controlling. *See Nyquist, supra,* 413 U.S. at 794. What is important is the operation of the tax benefit. As demonstrated above, the Minnesota deduction, unlike the provisions at issue in *Nyquist,* operates as a true tax deduction. As a result, to the extent that the statute benefits religious institutions at all, it extends that benefit passively and not by means of any affirmative grant, subsidy, or reward. The statute cannot therefore be said to have a primary effect which either advances or inhibits religion. This Court must exercise care that it does not prevent the state from extending its "general [s]tate law benefits to all its citizens without regard to their religious belief." *Everson v. Board of Education, supra,* 330 U.S. at 16. Those who send

[12] Tax systems have been employed in a similar fashion elsewhere. *E.g., Public Funds for Public Schools v. Byrne, supra,* ($1000 tax exemption for each child in private school); *Kosydar v. Wolman,* 353 F. Supp. 744 (S.D. Oh. 1972), *aff'd sub nom., Grit v. Wolman,* 413 U.S. 901 (1973) (tax credit producing dollar-for-dollar rebate for "extraordinary" expenses). In each case, the active, promotional function of the tax benefit resulted in its invalidation.

their children to religious institutions "need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Board of Public Works, supra,* 426 U.S. at 746.

Plaintiffs have also contended that the challenged statute fails to adequately ensure that deductions will be taken by individual taxpayers only for secular expenses. No such requirement applies to true tax deductions and exemptions. Just as in *Walz, supra,* the passivity and indirectness of any benefit to religion flowing from the deduction renders any additional protection from sectarian aid unnecessary.

The indicia of neutrality applied under the primary effect test support the conclusion that Minn. Stat. § 290.09, subd. 22, is constitutional. Its benefits are available to a class of taxpayers which includes parents of students in schools which are private and public, secular and sectarian. The statute provides a true tax deduction which, if it benefits religious institutions at all, extends that benefit passively and not by means of any affirmative grant, subsidy, or reward. It does not have a primary effect which advances religion.

C. The Minnesota Tax Deduction Has A Secular Legislative Purpose.

Before the district court, plaintiffs did not present any argument that the challenged statute violated the first or "secular purpose" prong of the establishment clause test. *Mueller v. Allen, supra,* 514 F. Supp. at 1001. Before the court of appeals, they merely alleged that the facts which demonstrated an impermissible primary effect also showed that the challenged section has an improper legislative purpose. Both lower courts found "no indicia of an invalid nonsecular purpose." *Mueller v. Allen, supra,* 676 F.2d at 1198. Rather, they concluded that the "manifest purpose of the statute is

to provide all taxpayers a benefit which will . . . enhance the quality of education in both public and private education." *Id.*

On this point, the lower court opinions can engender little dispute. As has been recognized throughout establishment clause jurisprudence, the state has a valid secular purpose in seeking not to hinder the ability of its residents to provide their dependents with a safe, effective and varied educational environment. *See Wolman v. Walter, supra*; *Meek v. Pittenger*, 421 U.S. 349 (1975); *Nyquist, supra.* While plaintiffs now have sought to bolster their contention that the statute was born of a sectarian purpose, that effort relies on arguments which are disingenuous at best.

First, plaintiffs suggest that, while the statute's "ultimate purpose" is secular (i.e., to enhance the education of its schoolchildren), its "immediate purpose" is unconstitutional because it uses "state aid to religious institutions to advance that [ultimate] secular purpose." Petitioners' Brief at 68-69. In so dissecting the purpose prong of the *Lemon* test, plaintiffs engage in the kind of "legalistic minuet" in which this Court has said it will not participate. *Lemon v. Kurtzman, supra*, 403 U.S. at 614. Moreover, their construction of Minnesota's "immediate means" is erroneous, for Minn. Stat. § 290.09, subd. 22, does not use "state aid to religious institutions" to advance education, but rather uses tax deductions available to all taxpayers for certain education expenses to accomplish that "ultimate purpose."[13]

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[13] Even the case law upon which plaintiffs rely betrays their argument. In *Stone v. Graham*, 449 U.S. 39 (1980), "the pre-eminent purpose for posting the Ten Commandments on school room walls [was] plainly religious in nature." *Id.* at 41. However, this Court specifically found that even cases involving active state assistance to private schools are easily distinguishable from *Stone* because "[s]uch assistance has the obvious legitimate secular purpose of

Second, plaintiffs recite the history of Minn. Stat. § 290.09, subd. 22, positing that it demonstrates a sectarian purpose. An amendment to § 290.09, subd. 22, was introduced following the decision in *Minnesota Civil Liberties Union v. State*, 302 Minn. 216, 224 N.W.2d 344, *cert. denied*, 412 U.S. 998 (1974), which struck down a tuition tax credit provision. Petitioners' Brief at 70-71. However, that fact fails to show any improper purpose. Not only did the amendment follow the *MCLU v. State* decision by more than a year, the tax credit which plaintiffs say was replaced by the amended deduction was never found to have an improper purpose. *MCLU v. State, supra*, 302 Minn. at 226, 224 N.W.2d at 349. Equally important is that the deduction, enacted in 1955, can hardly be seen as a replacement for a law adopted and struck down in the 1970's. Even if some direct relationship existed between the two laws, that fact would not render the deduction's purpose invalid. *See, e.g., Committee for Public Education and Religious Liberty v. Regan, supra*, wherein the Court upheld a New York nonpublic school aid statute after the Court struck down two prior New York statutes in *Levitt v. Committee For Public Education and Religious Liberty*, 413 U.S.

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promoting educational opportunity. The posting of the Ten Commandments on classroom walls has no such secular purpose." *Id.* at 43 n.5.

Plaintiffs' reliance on an article by Professor Ely in their "ultimate purpose" analysis, Petitioners' Brief at 68, is equally misplaced. In that article, Professor Ely states that, with regard to the religion clauses, "[a] choice legitimately justifiable in terms of a nonreligious and otherwise permissible goal should be upheld, without inquiry into motivation." Ely, *Legislative & Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1324 (1970).

472 (1973) and *Nyquist, supra*. The introduction and enactment of the amendment to Minn. Stat. § 290.09, subd. 22, demonstrates only the Minnesota legislature's interest in continuing to effectuate its valid secular purpose of aiding education in a constitutionally acceptable manner.

Finally, plaintiffs make a curious attempt to show that the deduction has an improper purpose by reference to an entirely different law. Petitioner's Brief at 74-76. They suggest that amendments in 1978 to the Minnesota Aids to Nonpublic Schools Act, Minn. Stat. §§ 123.931 to 123.947 (1980), somehow tainted the deduction adopted in 1955 and amended in 1976. In 1975, the Minnesota legislature enacted 1975 Minn. Laws ch. 396 which provided for the distribution of texts, instructional materials and auxiliary aids to nonpublic schools. In 1976, chapter 396 was upheld by a three-judge panel. *Minnesota Civil Liberties Union v. Casmey*, No. 3-76-8 (D. Minn. Nov. 30, 1976). That decision was remanded by this Court for reconsideration in light of *Wolman v. Walter, supra*. *MCLU v. Casmey*, 433 U.S. 903 (1977). On remand, the district court did not strike down the program as it related to sectarian schools, as plaintiffs contend. Petitioners' Brief at 74-75. Rather, the parties stipulated to limit the aid which would be granted to sectarian nonpublic schools. The district court approved the stipulation and also held that the provisions of chapter 396, granting aid to nonsectarian nonpublic schools, were severable and could remain in force. *MCLU v. Casmey, supra*, slip. op. at 2 (D. Minn. Oct. 31, 1977).

Contrary to plaintiffs' allegations, the legislature did not respond to the *Casmey* decision by "abruptly" terminating the program established in 1975. Petitioners' Brief at 75. Rather, in 1978, the legislature merely amended the program to bring

it in line with *Wolman v. Walter, supra.*[14] It deleted the provision of instructional materials, equipment and auxiliary services, and added the provision of textbooks, standardized tests, guidance and counseling services and health services. This legislative action was intended only to provide aid to nonpublic schools in a constitutionally acceptable manner. No improper purpose can be imputed to it. Plainly, it provides no support to plaintiffs' contention that the challenged deduction has an improper purpose.

D. The Statute Does Not Promote Excessive Government Entanglement With Religion.

The entanglement test concerns the excessive involvement of the state in church-related areas. Enforcement of the challenged provision occasions no such interference. The only potential state involvement under the statute is the determination of whether a particular deduction was properly taken. Such a determination involves only a routine audit of an individual taxpayer. This is not entanglement. *See Committee for Public Education and Religious Liberty v. Regan, supra,* 444 U.S. at 660. (Straightforward process susceptible to routinization does not violate the entanglement prong).

In fact, tax decisions are frequently made on the basis of whether an organization is or is not a religious organization. However, those decisions do not impermissibly entangle the state in church affairs. *Walz, supra* (upholding a property

[14] As plaintiffs indicate, the 1978 legislature also provided for the distribution of instructional materials to certain nonsectarian, nonpublic schools for the period April 5, 1978, to June 30, 1979. 1978 Minn. Laws, ch. 733, § 19. However, as the above discussion demonstrates, this provision was hardly the full extent of the nonpublic school aid program, as plaintiffs erroneously contend. Petitioners' Brief at 75.

tax exemption although state review would be required to determine whether property was devoted to a religious purpose).

The type of church-state involvement that is forbidden by the entanglement prong is far removed from the individual audit presented here. In cases where the Court has found an entanglement violation, it has been concerned with systematic state surveillance of teachers within the parochial school and with review of the religious institution's records to determine the amount of reimbursable expenditures attributable to religious activity. *Meek v. Pittenger, supra*; *Lemon v. Kurtzman, supra.* The key constitutional difficulty found in those cases has been the creation of an ongoing relationship between state and church.

No systematic surveillance of parochial school activity is involved in this case and no review of an institution's records is required. Thus, there has been no creation of an ongoing church-state relationship forbidden by the entanglement prong. Moreover, since the Court has held that even state audits of parochial school records may be permissible, *Committee for Public Education and Religious Liberty v. Regan, supra,* there is no question that the limited audit utilized here survives entanglement scrutiny.

Similarly, plaintiffs have failed to present any plausible argument as to why a tax deduction will result in political entanglement of church and state. The twenty-seven year history of the statute reveals no political controversy along sectarian lines. Further, the deduction provided under the challenged statute is fundamentally different from the direct assistance programs which have been thought to engender political entanglement. *Cf. Lemon v. Kurtzman, supra.* Critical to the holding in *Lemon* was the fact that annual appropria-

tions were required to further the challenged program. Similarly, in *Nyquist, supra,* the Court, while not expressly finding an entanglement violation, did express concern with the annual appropriation required in that program. As with administrative entanglement, the concern with political entanglement results from the creation of an ongoing relationship between the church and state. In this context, the relationship occurs in the political appropriations process.[15] With a tax deduction, however, no annual appropriation is required. Thus, the concerns expressed in *Lemon* and *Nyquist* are obviated. The only political process implicated is the decision whether to pass, repeal, or amend a statute. No case has ever suggested that a statute should be invalidated so that religious organizations are less likely to exercise their constitutionally protected rights of speech and petition. *See McDaniel v. Paty,* 435 U.S. 618 (1978).

It is clear that the challenged statute will promote neither administrative nor political entanglement. The plaintiffs' arguments to the contrary must be rejected.

II. EVEN IF THE MINNESOTA TAX DEDUCTION IS NOT CONSTITUTIONAL IN ITS ENTIRETY, THE TRANSPORTATION AND TEXTBOOK PORTION OF THE STATUTE MAY PROPERLY BE SEVERED AND UPHELD.

Under Minnesota law, all statutes are to be construed as severable in the absence of an express legislative indication to the contrary. Minn. Stat. § 645.20 (1980). Minn. Stat. § 290.09, subd. 22 (1980), does not contain a non-severability clause,

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[15] However, even an ongoing need for appropriations will not always result in a finding of impermissible entanglement. *Roemer v. Board of Public Works, supra.*

and the transportation, textbook, and tuition portions of the statute are not so interrelated as to make severability impossible or illogical. Accordingly, if this Court should determine that all portions of section 290.09, subd. 22 cannot be applied in a constitutional manner, the remaining portions should be severed and sustained.

The constitutionality of the deduction for transportation expenses cannot reasonably be doubted. In *Everson v. Board of Education, supra,* the Court held constitutional a New Jersey statute which authorized the state to reimburse parents for the cost of transporting their children to nonpublic schools on public bus lines. The continued validity of *Everson* is not contested by plaintiffs. Thus, since a tax deduction program is necessarily more favored under the establishment clause than a reimbursement program, the challenged section must be sustained insofar as it authorizes a tax deduction for expenses incurred in transporting dependents to and from school.

The petitioners complain that the deduction may be taken for field trip transportation and that such a deduction is contrary to the Court's decision in *Wolman v. Walter, supra.* In that case, the Court ruled that the state could not provide field trip transportation to sectarian schools because of the control maintained by the schools over the frequency and purpose of the trips. But the Court was not presented there with the inherently indirect and passive tax deduction presented here. Much as deductions for other payments to the school of one's choice do not result in an impermissible "advancement of religion," those for transportation do not.

Similarly, the Minnesota tax deduction must be upheld as it pertains to textbooks. This conclusion is compelled by a number of decisions in which the Court has held constitutional

programs providing secular textbooks to nonpublic school students. *See Wolman v. Walter, supra*; *Meek v. Pittenger, supra*, 421 U.S. at 359-62; *Board of Education v. Allen, supra*. Again, the continued validity of these cases is not contested by plaintiffs and, again, approval of direct assistance programs in *Wolman, Meek* and *Allen* compel the approval of a tax deduction serving the same function.[16]

---

[16] Plaintiffs contend that the deduction somehow results in deductions for sectarian textbooks because Minnesota provides for the loan of secular textbooks to both public and private schools. Petitioners' Brief at 81. Since the challenged law prohibits deductions for sectarian texts, plaintiffs' argument essentially is that parents of sectarian students are violating the challenged statute. However, they submit no evidence to support this proposition, nor do they suggest why violations of a statute render that statute unconstitutional.

CONCLUSION

For the reasons stated, the decision of the court of appeals should be affirmed and the challenged statute upheld.

January, 1983.

Respectfully submitted,

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APPENDIX

APPENDIX A

Distribution of Dependent Expenses Deduction
By Size of Dependent Expenses Deduction ($100 brackets)
Estimated from a Sample of 1980 M-1 Returns

Size of Dependent Education Expenses Deduction	Number of Returns	Number of Dependents
$ 1 - $ 100	29,470	58,024
101 - 200	15,341	39,732
201 - 300	8,524	19,092
301 - 400	5,127	11,803
401 - 500	3,582	9,007
501 - 600	3,806	9,889
601 - 700	3,108	9,456
701 - 800	6,793	14,399
801 - 900	1,094	3,377
901 - 1,000	1,172	3,436
1,001 - 1,100	1,091	2,279
1,101 - 1,200	556	1,524
1,201 - 1,300	755	2,502
1,301 - 1,400	720	2,423
1,401 - 1,500	1,841	4,814
1,501 - 1,600	394	2,279
1,601 - 1,700	12	74
1,701 - 1,800	589	2,622
1,801 - 1,900	144	68
1,901 - 2,000	441	1,653
2,001 - 2,100	61	252
2,101 - 2,200	292	1,152
2,201 - 2,300	4	22
2,301 - 2,500	94	461
2,501 - 2,700	345	1,732
2,701 - 3,000	348	2,329
Over $3,000	45	269
	85,749	204,670

Source: Minnesota Department of Revenue
Research Office
October 28, 1982

APPENDIX B

Distribution of Dependent Education Expenses Deduction By Size of Dependent Education Expenses Deduction From the 1978 Individual Income Tax Sample

Size of Dependent Education Expenses Deduction	Number of Returns	Number of Dependents
$ 1 - $ 100	3,502	7,697
101 - 200	4,341	13,052
201 - 300	3,492	8,736
301 - 400	3,176	8,129
401 - 500	2,862	7,656
501 - 600	2,773	5,860
601 - 700	1,584	4,354
701 - 800	4,092	10,488
801 - 900	862	2,633
901 - 1,000	678	2,405
1,001 - 1,100	1,169	3,500
1,101 - 1,200	342	885
1,200 - 1,300	488	1,225
1,301 - 1,400	220	1,063
1,401 - 1,500	1,200	3,367
1,501 - 1,600	271	1,104
1,601 - 1,700	353	905
1,701 - 1,800	235	694
1,801 - 1,900	40	202
1,901 - 2,000	233	720
2,001 - 2,100	111	488
2,101 - 2,200	365	1,288
2,201 - 2,300	22	109
2,301 - 2,500	122	533
Over 2,500	317	1,795
	32,850	88,888

Source: Minnesota Department of Revenue
Research Office
October 28, 1982

Office-Supreme Court, U.S.
FILED
FEB 3 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-195

IN THE

Supreme Court of the United States

October Term, 1982

VAN D. MUELLER AND JUNE NOYES,

Petitioners,

vs.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN, AND DOROTHY DEHAAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN AND DOROTHY DEHAAN.

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224-7632 — Baker Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED FOR REVIEW

Does a Minnesota statute, which grants a taxpayer a deduction on his state tax return, up to a certain maximum, for amounts he has paid to others for tuition, textbooks and transportation for dependents attending a qualified elementary or secondary school, either public or nonpublic, in any way violate the Establishment Clause of the First Amendment?

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Secondary Authority:

Federal Rules of Civil Procedure, Rule 24 4

IN THE

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NO. 82-195

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VAN D. MUELLER AND JUNE NOYES,
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BRIEF OF RESPONDENTS BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN AND DOROTHY DEHAAN.

CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

STATUTE INVOLVED

The statute here involved is an integral part of the Minnesota State income tax laws set forth in Minnesota Statutes, Chapter 290. The law allows certain deductions from gross income to be made in determining net income which is then subject to tax. One of those deductions is found at Minnesota Statutes §290.09, Subd. 22. It allows a deduction for:

> Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964[1] and chapter 363.[2] As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used

[1] 42 U.S.C.A. §2000c *et seq.*

[2] The Minnesota Department of Human Rights Act.

in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

STATEMENT OF THE CASE

This is an action challenging a Minnesota state income tax provision, Minn. Stat. §290.09, Subd. 22, as being in contravention of the First Amendment, as applied to the states through the Fourteenth Amendment.

The petitioners are citizens and taxpayers of Minnesota who are interested in maintaining the separation of church and state.

Respondent Clyde E. Allen, Jr. is sued in his capacity as Commissioner of the Department of Revenue of Minnesota.

Respondent Brenda B. Becker is a single parent with children attending St. Paul Academy, a nonpublic school with no religious affiliation. Respondents Richard and Marjorie Hollingsworth are parents of children attending Central Lutheran School and Concordia Academy, both in St. Paul, Minnesota. Respondents Roger and Dorothy DeHaan[3] are parents of a child attending Hollandale Christian School, Hollandale, Minnesota. These schools are religiously affiliated.[4]

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[3] The remaining respondents, as taxpayers and parents, are separately represented by Timothy P. Quinn, Esq.

[4] The term "church-sponsored schools" appears to come from *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472, 476 (1973). Respondents would prefer the term "nonpublic" schools in distinction to public schools. A further distinction can then be made between nonpublic schools which have or do not have any religious affiliation.

These respondents are Minnesota residents and taxpayers who have claimed the deduction at issue here on their Minnesota tax returns for a number of years, and intend to claim it so long as they have eligible dependents.[5] These respondents thus have a personal stake in the outcome of this litigation.[6]

The challenged statute authorizes Minnesota taxpayers to claim income tax deductions for tuition, textbooks and transportation expenditures made on behalf of their dependents attending certain qualified elementary or secondary schools. This includes *both* public and nonpublic schools.

The statute was first enacted in 1955; it simply granted a deduction for tuition and transportation expenses paid to others, to a maximum of $200. 1955 Minn. Laws, Ch. 741. The statute was in effect for 1955 and many subsequent years without constitutional challenge. In 1976 the statute was amended to allow the deduction for up to $500 for expenses for children in kindergarten through grade 6, and up to $700 for expenses for children in grade 7 through grade 12. Also qualifying for the deduction was an expenditure for secular textbooks. In addition, "school" was defined to include only those nonprofit schools where a child could fulfill compulsory attendance requirements and where state and federal civil rights laws were observed. 1976 Minn. Laws Ch. 37. The statute was amended a third time in 1978 to exclude expenses relating to "extracurricular activities".[7] 1978 Minn. Laws Ch. 766.

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[5] The state income tax forms for 1980 and 1978 are found at Petitioners' Brief, Appendix A.

[6] The two groups of respondents were accorded the right to intervene under Rule 24, Federal Rules of Civil Procedure.

[7] However, certain types of extracurricular activities were by interpretation made subject to the deduction, where the school awarded credit for participation. See JA 10-12 and 23-24, the latter relating to driver's training expenses.

The statute provides a deduction similar to many other deductions allowed by state or federal law. The mechanics of the deduction can be briefly stated as follows:

1. The taxpayer must pay others[8] for the tuition, transportation or textbook expenses in the calendar year for which he is filing the return.

2. The deduction is limited to $500 or $700, depending on the grade level of the dependent.

3. The taxpayer must itemize deductions. If he claims the "standard deduction" which is ten percent of adjusted gross income under Minnesota law, he is not eligible for this or any other deduction, except for the federal income tax deduction.[9]

4. He must have a taxable net income, considering all other allowable deductions.

5. The deduction and resulting net income subject to tax must cause his income to be in a lower tax table or a lower bracket set forth in Minn. Stat. §290.06, Subd. 2(c). The tax tables are based on $50 increments while the schedule of rates for higher income taxpayers (taxable net income in excess of $20,000), is based on a percentage formula.[10]

Like any other deduction, the benefit to the taxpayer is a function of his taxable income and the rate of taxation. Assuming a taxpayer is subject to the maximum rate of tax under Minnesota law (16%), the maximum benefit to the tax-

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[8] "Others" could include the school as to tuition or rental of equipment, or a public transportation system as to transportation. See Memorandum of Caulfield, JA 17-22.

[9] Minn. Stat. §290.09, Subd. 15 (1980).

[10] For taxable years after December 31, 1980, the taxable net income bracket, the standard deduction and the personal credit amounts are adjusted for inflation, in accordance with the formula set forth at Minn. Stat. §290.06, Subd. 2(d).

payer for a $700 deduction would also be 16% or $112.00. For example:

Taxable Net Income Without this Deduction	Taxable Net Income Claiming Maximum $700 Deduction
$30,000	$ 29,300
X .16	X .16
Tax = 4,800	Tax = 4,688
Difference = $112.00	

If the taxable income is lower, the tax rates are lower and the deduction is diminished correspondingly.

For example, a person with a taxable net income of $13,000 and claiming a deduction of $300 would realize a benefit of $42. That person is taxed at a 14% rate:

Taxable net income Without Claiming This Deduction	Taxable net income Claiming $300 Deduction
$13,000	$12,700
X .14	X .14
Tax = $ 1,820	$ 1,778
Difference = $42.00	

The statute thus operates as a true tax deduction: it is limited to actual expenditures; it does not provide direct financial aid to the taxpayer; it does not directly subsidize any activity and it does not operate as a credit against the tax due.[11] The fact

[11] A tax credit would provide more direct benefits in that the taxpayer would receive a dollar-for-dollar reduction in his taxes due. Also, many credit-type statutes have a mechanism for a direct grant or payment in the absence of taxable income.

that this statute operates as a "true tax deduction" was quite important in the thinking of the lower district court. *See, Mueller v. Allen*, 514 F.Supp. 998, 1002 (D. Minn. 1981).

The deduction is allowable to *all* taxpayers who have dependents in elementary or secondary schools, public or nonpublic, religiously affiliated or not. Of particular importance constitutionally are the benefits available to *public* school parents. It is true that the public school districts cannot charge tuition in the ordinary sense for a student residing in the district.[12] They can and do charge tuition, however, when a child from another district is educated in their district,[13] for special tutoring, driver's education, and summer school tuition. The affidavit of Ronald Moir, a state employee, indicates that in the school year 1978-1979, the state received $2,005,142 in tuition payments from public school parents. (JA 36-39). This must be considered a conservative figure in that summer school driver's education is omitted. In addition, expenditures made by public school parents for education outside the state or for special classes or summer school at non-public schools are *not* included. Petitioners denigrate the importance of this figure by saying this is an *average* of $2.49 per public school student. (Brief, p. 9). Petitioners arrive at $2.49 by dividing $2,005,142 by the *total* number of public school students in the state, or 815,155.[14] Obviously this is faulty reasoning and once again shows the facile use of statistics by petitioner. The number of public

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[12] Minn. Stat. §120.06.

[13] Minn. Stat. §123.39, Subd. 5. Footnote 4 of Petitioners' brief seems to question the payment of tuition by parents for inter-district education. The Moir affidavit, however, is simply a recitation of data found in the accounting code for Minnesota public school districts.

[14] JA 26.

school parents actually claiming the deduction is not known, but certainly an *average* figure is not representative of the size of deductions actually taken. (Petitioners are also in error by *presuming* that each of the 88,000 non-public students are charged tuition by their schools. (Brief 7-9). There is no record support for this presumption; in fact, many non-public schools do not charge *any* tuition.)

Further, public school parents can and do pay a variety of fees to the public school districts. The detailed list is found at Minn. Stat. §120.73. In 1978-1979, payments of fees amounted to $907,000.[15] Representative fees include those for physical education and athletic equipment, rental fees for musical instruments, and items such as those used in home economics class or shop class. In turn, most of these fees are subject to the deduction. Further the State Board of Education has the authority to specify further authorized fees by using its rule-making authority.[16] It seems only logical that the Board of Education will seek to enlarge the fees payable by parents of public school students as a means to alleviate the fiscal difficulties facing this state in coming years.

Tax benefits are obviously available to nonpublic school parents under this statute. There were 88,524 children enrolled in nonpublic schools in Minnesota for the school year 1978-79, and of these 4,281 were enrolled in nonpublic, nonsectarian schools, while 85,243 were enrolled in nonpublic schools with some type of religious affiliation.[17]

The record does not reveal, however, the separate number of public or nonpublic parents claiming the deduction, the amount of deduction claimed by the two parent classes or

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[15] JA 37-38. See Memoranda of G. Caulfield, JA 17-24.

[16] Minn. Stat. §120.75, Subd. 2.

[17] JA 25-27.

whether the deductions are for tuition, textbooks or transportation. The Revenue Department simply does not maintain that type of data and could not provide it short of an audit of all taxpayer returns claiming the deduction. See, JA 2-9. Petitioners' extrapolation of data found at Appendix B is therefore interesting but remains purely conjectural.

There is evidence in the record that for the year 1978, the state abstained from taxing income in the amount of $2.4 million.[18]

The constitutionality of this statute was first decided in 1978, when a Three-Judge Federal Court upheld the statute. *Minnesota Civil Liberties Union v. Roemer*, 452 F.Supp. 1316 (D. Minn. 1978). No appeal was taken from that decision. The present action was commenced in 1980 and again the statute was upheld by decision of Judge Renner who granted Summary Judgment for the defendants. *Mueller v. Allen, supra.* On appeal the statute was upheld a third time. *Mueller v. Allen*, 676 F.2d 1195 (8th Cir. 1982).

This Court granted petitioners' Writ of Certiorari on October 4, 1982.

SUMMARY OF ARGUMENT

The statute here provides a modest form of tax relief to *all* Minnesota taxpayers who have dependents in qualifying elementary and secondary schools. This includes all the public schools, together with non-public schools, some of which have religious affiliation. The statute provides the relief in the form of a tax deduction on the person's individual tax return in the actual amount of the school expenses, but not to exceed $500 for grades Kindergarten through 6 and not to exceed $700 for grades 7 through 12.

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[18] JA 5.

The statute has been in effect since 1955, but was not challenged until amended to provide larger deductions, which occurred in 1976. After amendment, the statute has been upheld three times, in 1978 by a Three-Judge Federal Court, in 1981 by Judge Renner, and in 1982 by the 8th Circuit Court of Appeals. The statute was challenged on the basis of the Establishment Clause.

The standard to be applied is the now familiar three-pronged test: The statute must have a secular legislative purpose, must not have the principal or primary effect of advancing religion, and must not foster an excessive entanglement with religion.

The standard must remain flexible, dependent upon the facts and circumstances of the case. Further, the standard is not an end in itself, but simply a means of achieving neutrality, namely, a neutral course between the absolutes phrased in the two religion clauses of the First Amendment.

1. The statute has a secular purpose in that it recognizes that the primary obligation for education belongs to the parents, not to the state. It recognizes that obligation by according a small tax benefit to the parent for his or her dependents' school expenses. Thus the statute assists taxpayers by helping provide a safe, effective, and diverse educational environment, and enhancing the quality of education in both public and nonpublic schools. The title of the Act is secular and its purposes are clearly secular.

2. The statute does not have the principal or primary effect of advancing religion. The statute advances *education* of the youth of Minnesota, not religion.

The case law clearly recognizes that *indirect* benefits may be accorded to churches or religious schools without causing a violation of the Establishment Clause. The benefits to religious schools here are extremely remote and indirect.

The real beneficiaries of the Act are parents and children, not schools. While this is not the controlling principle, both *Everson* and *Allen* have pointed out the significance of assistance going to parents and children.

The class benefited is broad: all taxpayers with children in elementary or secondary schools who incur expenses in the nature of tuition, transportation and secular textbooks. The breadth of the class makes the statute similar to *Everson*, *Allen* and *Walz* and distinguishes this statute from those providing benefits only to non-public school pupils or parents. Public school parents have been eligible for significant deductions under the Act. The evidence shows that for one year, public school parents paid over $2,000,000 in various types of tuition to the public schools and over $900,000 in "user fees". Recent data shows that public school parents must be taking advantage of the Act, in that 68% of the deductions were for less than $400, which is less than the average tuition in non-public schools. Thus the benefited class is not mythical; it is broad based.

The statute does not cause a sponsorship of religious activity. There is no incentive or reward for sending a child to a non-public school. The statute merely accords an indirect benefit, neutrally available to all, limited to the taxpayers' actual expenses, and dependent upon his income and tax rate. The statute is thus similar to other forms of "true deductions" available under both state and federal laws. It is analogous to the deduction for charitable contributions in both federal and state tax laws.

Nyquist can thus be distinguished on two bases: (a) the tax credit statute there operated more as an incentive rather than a true deduction; (b) the tax benefits there were limited to private school parents, as opposed to the broad class of parents

with dependents in both public and non-public schools benefited under the Minnesota law.

3. The statute does not foster an excessive entanglement with religion. There is no new church-state relationship created. The taxpayer is subject to audit and must prove his expenses, similar to any other deduction. Further, no strife or division has been created by this law, in effect since 1955, and none should be presumed.

The statute is valid in all respects.

ARGUMENT

THE STATUTE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. Background.

This case concerns education and specifically the education of students in the grade and secondary levels. Petitioners allege that the state cannot provide indirect assistance to the parents of these children to help them meet educational expenses. Petitioners would appear to concede the validity of the statute as to public school parents and as to nonpublic school parents with children in nonsectarian schools. Petitioners' main argument is that the benefits are "skewed" in favor of parents with children in sectarian schools, thereby allegedly causing a violation of the Establishment Clause.

It is interesting to note that the controversy over "sectarian schools" only began in 1947 when this Court decided *Everson v. Board of Education*, 330 U.S. 1 (1947). There seemed to be little controversy in 1925 when the Court decided that Oregon could not mandate the attendance of children only in the public school system of that state. *Pierce v. Society of Sisters*, 268

U.S. 510 (1925). And in 1930 the Court held in *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930) that the state could purchase secular textbooks and supply them free to all the school children in the state. Although the decision was based on a property theory, the Court recognized that it was the state and education that benefited, not the nonpublic schools.

> The Legislation does not segregate private schools or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded. 281 U.S. at 375.

Further, the "controversy" over nonpublic schools that have some form of religious affiliation does not extend to other institutions which perform a dual function, both secular and sectarian. Thus the Court had little difficulty in sustaining a federal grant for construction of a public ward to be administered as part of a hospital under the control of a religious order in *Bradfield v. Roberts*, 175 U.S. 291 (1899).[19] In more recent times, hospitals owned and administered by religious bodies and religious orders have received massive grants for construction under the Hill-Burton Act, 42 U.S.C. 291, *et seq.*, without any serious question raised as to the constitutionality of the Act. The same is true for orphanages, children's homes and many other institutions that perform both secular and sectarian activities.

Education, however, appears to be on a different plane, even though the reasons for the distinction are not entirely clear.

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[19] This appears to be the first case interpreting the Establishment Clause in regard to governmental assistance programs.

How, then, should the Establishment Clause be interpreted in regard to a statute providing benefits to parents of children attending both public and nonpublic schools, some with religious affiliation and some not? Is it true, as the Minnesota Supreme Court intimated, in *Minnesota Civil Liberties Union v. State of Minnesota*, 302 Minn. 216, 224 N.W.2d 344 (1974) that the test has become one of "any effects" instead of the "principal and primary effect"? Respondents think not. On the contrary, respondents assert that a state program of assistance to parents of all school children is valid under the Establishment Clause, as all the lower federal courts decided in regard to this Minnesota law.

B. The Test Must Be Flexible.

The Court has said time and again that a flexible approach must be taken to interpretation of the Establishment Clause. The most recent expression is found in *Committee for Public Education v. Regan*, 444 U.S. 646, 662 (1980):

> What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the states—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

Chief Justice Burger expressed the same principle well in *Tilton v. Richardson*, 403 U.S. 672, 677-678 (1971):

> Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper that can be used to measure the precise degree to which these three factors[20] are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental actions challenged as violative of the Establishment Clause. There are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired. . . . candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Flexibility is not, however, an end in itself; it is a legitimate means to steer the Court between the Establishment Clause and the Free Exercise Clause, both of which are phrased in absolute terms. The absolutes are a governmentally established religion and a governmental interference with religion. However,

> Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benev-

[20] Identified as "sponsorship, financial support, and active involvement of the sovereign in religious activity". *Id.*, 403 U.S. at 677.

olent neutrality which will permit religious exercise to exist without sponsorship and without interference. *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

C. The Test Must Achieve Neutrality.

The Court has indicated many times that the desired result is a position of *neutrality*. *See, Board of Education v. Allen*, 392 U.S. 236, 242 (1968); *Roemer v. Board of Public Works*, 426 U.S. 736, 746-747 (1976). Similar to flexibility, however, neutrality is not an end or a virtue in itself. It is a desired result because it allows religious convictions to exist on their own merits, that is, without either interference or sponsorship from the government. This principle is especially important in a tax case because an exemption from taxation is the obvious legislative choice by which to achieve neutrality. As stated in *Walz v. Tax Commission, supra*,

> The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. 397 U.S. at 672.

The desired neutrality also serves another very clear purpose: it avoids active involvement of the sovereign in religious matters which would cause strife and division. In short, government avoids strife by remaining neutral in religious matters. This appears to be the basis for the "entanglement" aspect of the test first introduced in *Walz v. Tax Commission, supra*.

D. The Test Is Now Well Accepted.

The Court has fashioned a three-part test in this area, which is now well-accepted. It was first fully expressed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed. 1060 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra*, at 674, 25 L. Ed. 2d at 704.[21] 403 U.S. at 612-613.

1. The statute has a valid secular legislative purpose.

Petitioners' argument on this point (Brief, 67-76) is indeed curious in that they raised the issue in their pleadings, but declined to brief or argue this part of the test before the Trial Court. *See, Mueller v. Allen, supra*, 514 F. Supp. at 1001. The issue was raised before the Eighth Circuit, but that Court quickly dispatched with the contentions of the petitioners. *Mueller v. Allen, supra*, 676 F.2d at 1198. Despite this, respondents will address the issue here, largely because of the novel arguments raised by petitioners.

The secular purpose test was analyzed in greatest detail in *McGowan v. Maryland*, 366 U.S. 420 (1961), dealing with a Sunday closing law. The Court held the statute had a secular legislative purpose to provide one day free from commercial activity, allowing only activities which are necessary or recreational. The Court placed emphasis on the title of the Act,

[21] The first two aspects of the test, while mentioned in prior case law, were first adopted in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963).

the presumption of constitutionality, and the reason behind the legislation.

The title of the Act[22] here is straightforward: "An act relating to taxation; increasing the income tax deduction for dependents' school expenses; amending Minnesota Statutes 1974, Section 290.09, Subdivision 22." There is clearly no reference to religion, religiously affiliated schools, or worship in the title. Instead, the legislature is simply providing a tax deduction for school expenses incurred by the taxpayer, without regard to *where* those expenses are incurred.

The purpose of the statute is simply to provide all taxpayers (with school age dependents) a benefit which will operate to enhance the quality of education in both public and nonpublic schools. The statute assists taxpayers by helping provide a safe, effective, and diverse educational environment. Similar purposes have been accepted in other Establishment Clause cases where education of youth was pivotal to the Act, even where the statute was declared invalid on other grounds. *See, Meek v. Pittenger*, 421 U.S. 349, 368 (1975); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973).

In *Wolman v. Walter*, 433 U.S. 229, 262 (1977), Justice Powell in a separate opinion stated the classic interest of the state in the education of its youth:

> The state has . . . a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

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[22] 1976 Minn. Laws, Ch. 37. The title of the original legislation was simply "An act relating to taxes on and measured by net income . . ." 1955 Minn. Laws, Ch. 741.

The interest of the Minnesota legislature is identical. In its Constitution, Article XIII, Sec. 1, Minnesota has recognized the high priority accorded education, and the reasons therefor:

> The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough an efficient system of public schools throughout the state.

In accord with *Pierce v. Society of Sisters, supra*, the legislature has also recognized the role of non-public education in the state. While no direct financial subsidy is accorded to non-public schools,[23] various forms of assistance are accorded to children and parents.[24]

The legislature has also recognized that the prevailing *obligation* for education of youth lies not with the state, but with the parents. The state may facilitate education and provide a system of schools, but the obligation is on the parent to see to his child's education. That concept is clearly stated in the compulsory attendance law, where criminal penalties for non-attendance can be invoked against the parent or guardian. Minn. Stat. §120.12.

Another dimension is added in regard to religiously affiliated schools. The Free Exercise Clause may shield a parent from non-compliance with the compulsory attendance law, if

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[23] Direct subsidy of sectarian schools is prohibited by Article XIII, Sec. 2 of the Minnesota Constitution.

[24] *See*, e.g., Minn. Stat. §123.931-947, dealing with educational aids for nonpublic school children.

the attendance requirement is contrary to the parents' religious beliefs, and the child receives an adequate education through the system preferred by the parents. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Court there recognized the primacy of the parental obligation.

> . . . This case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.
>
> 406 U.S. at 232.

The statute here has a secular legislative purpose precisely because it addresses all of these important societal concerns. It fosters the education of youth, it helps to provide a safe, effective and varied educational environment, and it recognizes the primary role of the parent in the educational process.

Petitioners' arguments on this point do not ring true. They seek to confuse the secular purpose test with the primary effect test by arguing that the immediate purpose of the Act is to provide state aid to religious institutions. (Brief, 67-69). This statute clearly does not seek to provide state aid to religious institutions.[25] It provides assistance to parents so that they may accomplish the ultimate purpose of educating their children.

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[25] Even direct assistance to religious institutions may not violate the Establishment Clause, so long as the funds are used only for secular purposes. *Roemer v. Board of Public Works, supra*; *Tilton v. Richardson, supra.*

Next, petitioners engage in a lengthy discussion of the chronology of adoption of this law (Brief, 70-76), in an attempt to show it was motivated to assist religious schools. Petitioners are in error on a number of points[26] but of more concern is the veiled argument that certain groups apparently should not have access to the legislature to redress their grievances. That certainly is not the law. In addition, the Court has recognized that there is no "bright line guidance" in Establishment Clause cases,[27] which means that interested groups and state legislators must do a certain amount of groping to locate the proper line. This was well recognized in *Committee for Public Education v. Regan, supra.* The case involved a successful attempt to fashion a New York statute authorizing the use of public funds to reimburse nonpublic schools for performing certain testing and reporting services mandated by state law. The New York legislature acted in response to this Court's decision in *Levitt v. Committee for Public Education,* 413 U.S. 472 (1973) which voided an earlier statute. No fault can be found for attempting to draft and enact a valid statute!

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[26] The most glaring error is their failure to recognize that the prior tax credit statute was voided by the Minnesota Supreme Court in acquiescence to *Comm. for Public Ed. & Rel. Lib. v. Nyquist, supra,* based solely on the principal and primary effect, not the secular purpose test. In fact, the Court spoke eloquently of the secular purpose of that law.

> Suffice to say, it should be a proper legislative goal to provide equal opportunity to all children to have available to them the resources of all public school facilities and to avoid the denial of any of these services to them merely on the fact that their parents, in the exercise and control of their children, and in the exercise of their freedom of choice and freedom of religion, have chosen to have their children attend classes at a nonpublic school. *MCLU v. State, supra,* 302 Minn. at 234.

[27] *Comm. for Pub. Ed. and Rel. Lib. v. Nyquist, supra,* 413 U.S. 756, at 761, Footnote 5.

This statute has a clear secular purpose. It is addressing one of the gravest concerns of society—the education of our youth.

2. The statute does not have the principal or primary effect of advancing religion.

As discussed before, this aspect of the test attempts to steer a neutral course between the two Religion Clauses of the First Amendment. The major controversy has been to what extent may churches or religious institutions be benefited *indirectly* by the legislation.

It has been repeatedly stated that some indirect benefits may be accorded to religious entities without causing a violation of the Establishment Clause. This was recognized and acknowledged prior to *Nyquist* in *Everson v. Board of Education, supra, Walz v. Tax Commission, supra,* and *Tilton v. Richardson, supra.*

Some have read *Nyquist* as imposing an "any effects" test rather than a "primary effects" test. However, post-*Nyquist* decisions have repeatedly emphasized the same principle: a program which in some indirect manner aids a religiously affiliated school or a church is not necessarily invalid. Thus in *Roemer v. Board of Public Works, supra,* the Court indicated that religious institutions need not be "quarantined" from public benefits that are neutrally available to all.

> *Everson* and *Allen* put to rest any argument that the state may never act in such a way that has the incidental effect of facilitating religious activity. 426 U.S. at 747.

And in *Wolman v. Walter, supra,* Mr. Justice Powell, the author of *Nyquist,* wrote a separate opinion underscoring this principle, rejecting a more literal reading of *Meek v. Pittenger, supra.*

> If we took that course, it would become impossible to sustain state aid of any kind—even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. . . . The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause.
>
> 433 U.S. at 262.

More recently, the Court decided *Committee for Public Education v. Regan, supra,* and *Widmar v. Vincent,* 454 U.S. 263 (1981), the latter case upholding the use of meeting rooms at a secular university for religious groups.

If indirect aid is not an automatic violation of the Establishment Clause, where is the line to be drawn? Respondents submit that three elements of the statute must be examined: (1) Who is the immediate beneficiary of the statute; (2) What is the breadth of the class benefited and (3) Does the statute act affirmatively to encourage religious activity. No one of these elements alone will be determinative of constitutionality. Taken together, however, the statute will be valid if parents and children are the immediate beneficiaries, the class benefited is broad, and the statute does not affirmatively encourage religious activity.

a. Parents and children are the immediate beneficiaries.

The statute here clearly benefits parents and children, rather than institutions. This has been viewed as an important element in a number of cases. Thus in *Everson v. Board of Education, supra,* the Court said:

> The state contributes no money to the schools. It does not support them. Its legislation, as applied, does no more

> than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.
>
> 330 U.S. at 18.

And in *Board of Education v. Allen, supra*, the Court stressed the same principle:

> The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.
>
> 392 U.S. at 243-244.

If there is direct payment to the non-public school, instead of to parents, the statute will be either invalid or at least subject to extreme scrutiny, under the entanglement test. Thus in *Lemon v. Kurtzman, supra*, the Court noted:

> The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school.
>
> 403 U.S. at 621.

This principle also allowed the Court to rather summarily deal with the "maintenance and repair" part of the New York statute at issue in *Nyquist*, especially where there was no articulated secular restrictions.

Thus lack of direct receipt of funds by religious institutions is important, though certainly not controlling either way. The Court recently upheld another New York statute, even though it entailed *direct* payment of funds to religiously affiliated non-public schools. *Committee for Public Education v. Regan, supra.*

Some might refer to this as the "child benefit" theory. While it certainly has that aspect of immediate benefit to the parent and child, respondents would view it more as a "community benefit" theory. As developed in the introductory sections of this brief, it is the community and the state as a whole that benefits from an educated citizenry. Both the immediate parent-child benefits and the long range community benefits are important.

b. The benefited class is broad including both public and non-public school parents.

Both *Everson* and *Allen* stressed the fact that the benefits of transportation and textbook aid there provided were available to *all* parents and children, not just those attending non-public schools. Other courts have looked to the class benefited and if it consists only of non-public school children and parents, the statute is suspect and will usually be ruled invalid. *See, Committee for Public Education and Religious Liberty v. Nyquist, supra,* 413 U.S. at 783, footnote 38; *Minnesota Civil Liberties Union v. State of Minnesota, supra*; *Public Funds for Public Schools v. Marburger,* 358 F.Supp. 38 (D.N.J. 1973) aff'd. mem., 417 U.S. 961 (1974).

The breadth analysis was of the utmost importance in *Walz v. Tax Commission, supra.* The statute,

> . . . has not singled out one particular church or religious group or even churches as such; rather, it has

> granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.
>
> 397 U.S. at 673.[28]

The statute here is clearly drawn as broad as possible; all taxpayers with children in elementary or secondary schools. No special or arbitrary class is created. The statute is totally neutral on its face.

Much of petitioners' argument is premised on disbelief in facial neutrality; they assert the benefited class is predominantly sectarian parents and sectarian schools. Petitioners thus continue to dispute, as a factual matter, the findings of both lower courts that the statute extends substantial benefits to the entire broad class of taxpayers. This is indeed surprising in light of the fact that the lower court concluded petitioners' statistical analysis lacks "credibility by reason of omissions of serious significance". *Mueller v. Allen, supra*, 514 F.Supp. at 1003; further, the appeal court labeled petitioners' attempt at a de facto analysis as "uninformative". *Mueller v. Allen, supra*, 676 F.2d at 1200.

However, further analysis is necessary. First, petitioners' attempt to measure validity in terms of who actually *receives* benefits as contrasted with who is *eligible* for benefits, is misplaced. This information is simply not available and thus hypo-

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[28] The size and nature of the class, following *Walz*, has been viewed of great importance in cases of direct aid to facilities of higher education. *See, Tilton v. Richardson, supra*, and *Hunt v. McNair*, 413 U.S. 734 (1973). *See*, also, *Widmar v. Vincent, supra*, where the provision of benefits to a broad class of university students was "an important index of secular effect".

thetical conclusions are pure speculation. More importantly, this Court has engaged in a close examination of the benefited class only when the legislation was narrowly drawn and therefore suspect. In such cases further analysis is keyed to whether the special class is largely sectarian. Thus, in *Everson, Allen* and *Walz*, no inquiry is made into the percentage of recipients who attend sectarian schools, or the percentage of property owned by churches. Such analysis is irrelevant given the breadth of the class. On the other hand, a statistical analysis was important in *Nyquist* and *Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3rd Cir.), *aff'd. mem.*, 442 U.S. 907 (1979), precisely because the class consisted of only nonpublic school parents; the Court was forced to inquire into the sectarian element in order to test the "special legislation" at hand.

Second, even if examined, petitioners' statistical analysis is not convincing. They ignore the fact that over $2,000,000 was paid by *public* school parents for tuition. They continue to omit deductions available for summer school drivers' education, education outside the state, or for special classes or summer school paid to non-public schools. In addition, petitioners have not given recognition to the over $900,000 paid in "special fees" to districts by public school parents.

Recent data has been supplied to the Court in the brief of respondent Clyde Allen which is highly relevant here. *See* Appendix A and B of that brief. This shows the distribution of dependent expenses in $100 brackets, the number of returns and the number of dependents for the two years examined. For 1980, for example, about 30,000 returns claimed less than $100, 15,000 claimed less than $200, 8,500 returns claimed less than $300, and 5,100 returns claimed less than $400. Thus about 68% (58,000 out of 85,000 returns) claimed deductions

of less than $400. A large bulk of these returns must pertain to *public* school expenses in that the average sectarian tuition charge for 1979 was $420, by petitioners' own figures. (Brief, 8).

Thus, petitioners' use of statistics is not convincing. Both facially and as applied, this statute makes modest tax benefits available to the entire class of taxpayers with dependents, regardless of where they might be educated. The broad class benefited is of great importance in determining the neutrality of the statute.

c. The statute does not affirmatively encourage religious activity; there is no sponsorship of religion.

As discussed above, indirect aid to religious institutions is permissible while direct aid is either outright invalid or highly suspect. Further analysis is required, however, to determine if the indirect aid is possible or constitutes an active encouragement to participate in religious life. This analysis is necessary because *Nyquist* teaches us that if the program operates as an *incentive* to send children to religiously affiliated schools, there can be a violation of the Establishment Clause. *Nyquist*, 413 U.S. at 786.

The best discussion of this issue is found in *Walz v. Tax Commission, supra*, 397 U.S. at 675-676.

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll". There is no genuine nexus between tax exemption and establishment of religion.

Thus a tax exemption is not the same as a grant of money, even though it indirectly confers an economic benefit. The benefit is conferred passively and has the distinct advantage of maintaining the separation of church and state.

The "maintenance and repair" program struck down in *Nyquist* was clearly an affirmative grant from the state to the nonpublic schools and its effect was clearly to "subsidize and advance the religious mission of sectarian schools". 413 U.S. at 779. In addition, the "tuition reimbursement" program was held to be an affirmative grant to low-income parents; it had the same infirmities as the maintenance and repair program and the mere fact that the grant was directed to the parents rather than the school was not enough to validate it.

The third aspect of *Nyquist*, the tuition credit program, is much closer to the instant statute. The Court distinguished *Walz v. Tax Commission, supra*, indicating that a tax exemption tends to complement and reinforce the separation of church and state, insulating one from the other. And, the exemption of property there involved a broad class of property owners. The Court found both of these aspects absent from the tuition program and hence *Walz* was not controlling.

Respondents have already set forth their views on the benefited class. It is broad and therefore more akin to *Walz*, whereas the statute in *Nyquist* benefited *only* non-public school parents.

The remaining point is whether the Minnesota statute is closer to a tax exemption than to the tax credit or whatever label is to be accorded the third program in *Nyquist*.

First, it is clear that the Minnesota statute operates as a true tax deduction, as factually determined by the lower courts. It is limited to actual expenditures. It does not operate as a credit against the tax due. It does not provide direct financial

aid to the taxpayer. And, the amount of the benefit is solely the function of the rate of tax and the amount of taxable income. The Court in *Nyquist* made specific reference to the fact that the statute there did *not* have the elements of a genuine tax deduction. 413 U.S. at 790, N.49. The Court explained some of the differences between a true tax deduction and the disallowed statute:

> The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families.
>
> 413 U.S. at 790.

Under the Minnesota Statute, however, the amount of the deduction is limited to the expenses incurred by the parent, subject to the $500 or $700 maximum. There is no predetermined benefit accorded the parent. The value of the deduction is based solely on the amount of the deduction, the rate of tax and the taxable income of the taxpayer.[29]

Second, there is no logical distinction between a tax exemption and a tax deduction. The mechanics may be different, but the end result is exactly the same. The state abstains from taxing property or income in a certain amount in both instances. The deduction also has the same effect as in *Walz*, namely, insulating the affairs of church and state from each other.

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[29] As discussed in the Statement of the Case, the maximum any taxpayer could possibly receive is $112 per dependent.

Both lower courts compared the deduction here to the deduction for contributions under Internal Revenue Code, §170. The comparison is indeed apt. Both operate mechanically the same way. Both include a large class and are therefore facially neutral. Both provide only indirect assistance to sectarian institutions. In fact, the benefits to churches and sectarian institutions is vastly greater under the contribution deduction than the instant statute. Entire churches and religious institutions depend solely on charitable contributions for their existence. The constitutional significance here is that all of the contributed monies under §170 are used for sectarian purposes. There has never been any attempt to separate the secular from the sectarian since the reason for the contribution is simply to support church activities. Still, no Court has held or intimated that the charitable contribution deduction equals the sponsorship of religion.

The Minnesota statute likewise does not attempt to separate that portion of tuition related to secular as compared to sectarian. Such separation is necessary for a direct assistance program, but is not necessary for an indirect program that aids the parent with his primary obligation of education. In addition, the amount of the benefit cannot exceed the maximum tax rate (16%) multiplied by the deduction taken per child. Thus even with a maximum $700 deduction, and a taxpayer in the highest bracket, only 16% of that will be exempted from tax. Religiously affiliated schools are performing both a secular and sectarian function. *Board of Education v. Allen, supra.* They are providing a secular education comparable to that of the public schools, plus a religious education in accord with their system of beliefs. The deduction, even at maximum levels, could not possibly be attributed to the sectarian education provided in those schools which are religiously affiliated.

Petitioners attempt to distinguish the deduction here from charitable deductions by means of a "user fee" argument. Brief, 20-32. The distinction makes no sense, either factually or from a constitutional viewpoint. First, most taxpayers do get some services or direct "benefit" from a charitable contribution. For example, they have access to and use a museum, library, hospital, university or other institution they wish to assist. When they contribute to their church, they receive in return the benefit of the church's services, the programs offered, the counselling of the minister and the use of the very building itself. While a few charitable contributions may lack any use aspect by the donor, the vast majority entail some benefit to the donor.

Secondly, there are many deductions and credits under state and federal tax laws which involve a degree of use by the taxpayer. For example, Minnesota law provides a deduction for expenses incurred in adopting a child. These include agency and social service fees, attorney's fees and other expenses related to the adoption process. Minn. Stat. §290.09, Subd. 27. The taxpayer clearly gets a use and benefit from the agency and attorney that perform the services. In addition, most of the social service agencies have a religious affiliation, such as Lutheran Social Service, Catholic Charities, etc. Another example is the child and dependent care credit available under Minn. Stat. §290.067, and Internal Revenue Code, §44A. The taxpayer obviously gets a use or benefit. He or she pays another to provide child care. In addition, many child and day care centers are run by or affiliated with churches. Does it constitute the establishment of religion for the state to grant these types of deductions or credits?

Lastly, petitioners argue that the state and federal taxing authorities will disallow a charitable contribution if it in fact

is payment for tuition at a sectarian school. *Winters v. Commissioner*, 468 F.2d 778 (2nd Cir. 1972); *Gotlieb v. Commissioner of Taxation*, 310 Minn. 62, 245 N.W.2d 244 (1976). The only thing those cases hold is that a *charitable* contribution will not be allowed under §170 because the taxpayer is receiving something in value equal to the contribution. Such a result does not invalidate a different deduction, and as determined above, many deductions and credits contain a benefit or use on the part of the taxpayer. In addition, petitioners have failed to demonstrate why these cases have any constitutional significance. They do not; they are simply cases construing the validity of contributions under that section of the code.

Respondents assert that the deduction here is valid. The deduction is passive, indirect and remote. It does not amount to sponsorship of religion. In the words of the appeal court:

> . . . We conclude . . . that the state, in effect, abstains from taxing that income which has been denoted by a broad class of Minnesota citizens to their children's education. In so doing, the state has adopted a policy which is neutral toward religion by providing a tax benefit to those parents who qualify for a deduction for expenses incurred in sending their child to school. *Mueller v. Allen, supra*, 676 F.2d at 1205.

3. The statute does not foster an excessive governmental entanglement with religion.

The third aspect of the test examines both *administrative* relationships between church and state and the possibility of *strife* and division created by the law. *Walz v. Tax Commission, supra*; *Lemon v. Kurtzman, supra.*

a. There are no excessive administrative relationships created.

The statute does not create a new church-state relationship, but simply uses the mechanism of the state tax laws, wherein the relationship is present only between the state and the taxpayer. The taxpayer claims the deduction and it is he who must justify the deduction on audit. Even in that case, the only involvement would be to examine records of the taxpayer to make sure they support the claimed deduction. Thus he may have to supply cancelled checks, receipts or bills to verify the expenses. This is no different than any other deduction claimed by a taxpayer under federal or state law. Respondents cannot even conceive of a situation where the records of the school would have to be examined, except possibly to build a fraud case against a taxpayer who falsified his records. That obviously would be a very unusual situation. Even if it did occur, the examination of the school records would be a very straightforward process. It would also be a nonrecurring process. The recent case of *Committee for Public Education and Religious Liberty v. Regan, supra*, teaches us that an examination of the books and records of a sectarian school does not cause entanglement where the reimbursement process is straightforward and routine.

It would appear obvious that this statute, similar to other deduction-type law, does not entangle the church and state in each other's affairs.

b. No strife or division is created by the statute.

In *Walz v. Tax Commission, supra*, the Court placed great emphasis on the history of the tax exemption for real property, its acceptance by the people, and the lack of any strife or division created by the law. While the history is not so significant, the basic statute here has been in effect since 1955. No division along religious lines has occurred, no political wars and no evidence of strife is present in the community. Further, there is no need for annual appropriations to fund the bill. It is an integral part of the tax laws which needs no funding because of the abstention from tax created. Petitioners have offered no evidence in support of their entanglement theory. The words of Justice White in *Committee for Public Education and Religious Liberty v. Regan, supra*, 444 U.S. at 660-661, seem appropriate:

> On its face, therefore, the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated.

Respondents submit that the statute does not create entanglement, much less any "excessive entanglement".

CONCLUSION

For all of the varied reasons asserted above, the lower court should be upheld. The statute is constitutional.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
FEB 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-195

IN THE

Supreme Court of the United States

October Term, 1982

VAN D. MUELLER and JUNE NOYES,

Petitioners,

vs.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,

Respondents.

BRIEF FOR RESPONDENTS DENNIS J. BERTHIAUME, ET AL.

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220-7455 — Baker Publishing Co., 307 E. 4th St., St. Paul, Minn. 55101 — 220-7455

QUESTION PRESENTED FOR REVIEW

Does a Minnesota Income Tax Statute, which grants a taxpayer a deduction from gross income for the amount he has paid to others (not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12) for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school, wherein a resident of the state may legally fulfill the state's compulsory attendance law, which is not operated for profit and which adheres to the provisions of the Civil Rights Act of 1964, with no distinction being made as to whether or not such school is public or nonpublic, and with the requirement that such "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in the state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, meet the constitutional requirements as set down by the United States Supreme Court under the Establishment Clause of the First Amendment?

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Respondents.

BRIEF FOR RESPONDENTS DENNIS J. BERTHIAUME, ET AL.

STATEMENT OF THE CASE

This case presents a constitutional challenge to Minn. Stat. §290.09 as violative of the Establishment Clause of the First Amendment to the United States Constitution. This statute has been in effect since 1955 and grants to a taxpayer a deduction from gross income *for the actual amount he has paid to others*, up to a stated maximum for each dependent in grades K to 6 and a stated maximum for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school, wherein a resident of Minnesota may legally fulfill the state's compulsory attendance laws, without any distinction as to whether such school is public or nonpublic, religious or nonreligious.

In the first challenge to this statute, a three judge panel of the United States District Court for the District of Minnesota, in the case of *MCLU v. Roemer*, 452 F.Supp. 1316 (D. Minn., 1978), upheld its constitutionality under the Establishment Clause of the First Amendment. In that case, the Court stated:

> In our view the Minnesota law, if and when examined by the Supreme Court, will be found on the constitutional side of Jefferson's wall because the statute is neutral and neither advances nor impedes religious activity, benefits the parents of children attending both public and nonpublic schools, has received unchallenged historical acceptance, and is analogous to the long recognized practice of tax deductible contributions to religious and charitable causes by federal and state governments. Accordingly, the statute does not have the primary effect of advancing religion in violation of the Establishment Clause.

MCLU v. Roemer, id. at 1332.

Following this decision in *Roemer*, the law remained unchallenged until commencement of the present litigation, when its constitutionality was again upheld in the United States District Court for the District of Minnesota on May 13, 1981, [*Mueller v. Allen*, 514 F.Supp. 998 (D. Minn. 1981)], and then, on appeal, was upheld by the United States Court of Appeals for the Eighth Circuit on April 30, 1982, [*Mueller v. Allen*, 676 F.2d 1195 (8th Cir. 1982)], in a decision which is the subject of the present appeal.

The statute allows a deduction for educational expenses related to compulsory education. It is not limited to only those types of expenses peculiar to nonpublic schools. Furthermore, the statute provides for a tax deduction relating to actual educational expenses incurred and does not provide for a tax credit of the type struck down by *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). As such, the statute provides for a genuine tax deduction of the type distinguished by the Court in *Nyquist*. Id. at 790 n. 49. This case presents the first review of the constitutionality of such a genuine tax deduction statute.

Petitioners argue that the deductions are generally available only to parents of children in nonpublic schools. They have failed, however, to consider the many categories of tuition deductions likely to be taken by public school parents, as well as the multitude of deductible costs in the categories of transportation, books, materials and equipment, which may be available as well to public school parents. The parent of any school children in the State of Minnesota is likely to incur expenses which are deductible under the statute.

The Court below considered an apparent conflicting decision from the United States Court of Appeals for the First Circuit,

Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980). While the challenged statutes in the *Norberg* case and in this case are identical, the statistical evidence submitted and considered by the courts in each case had significant differences. The Court below, in evaluating the benefits of the statute in question, found that the statute provides relief which "is available to all parents with dependents attending elementary and secondary schools". *Mueller v. Allen*, supra at 1002.

Based upon the statistical evidence and other evidence in the record, the Court below reached a different conclusion from that of the First Circuit in *Norberg*, finding that *Norberg* was distinguishable from this case. There is no real conflict between the decision in *Norberg* and the decision of the Court below, only an apparent conflict because the Court in *Norberg* did not have sufficient facts on which to reach a decision as to the benefited class.

SUMMARY OF ARGUMENT

The Court below held that the challenged statute does not violate the establishment clause of the first amendment. In examining the law under consideration, it is necessary to apply the three part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the three part test, a law, in order to be constitutional under the Religion Clauses, first, must have a secular legislative purpose; second, the primary or principal effect of the law must neither advance nor inhibit religion; and, third, the law must not foster excessive entanglement between government and religion.

I. To be constitutionally permissible, a statute must provide benefits on a neutral basis and not have the primary effect of advancing religion. The Petitioners' contention is that the statute's benefits are generally available only to the parents of nonpublic school children. However, Petitioners' statistical evidence in support of that position is flawed and fails to take into account the substantial expenditures made by public school parents which are deductible under the statute.

The challenged statute does not provide for any direct grant or tax credits of the type struck down in *Nyquist*, supra. Rather, it makes available to all eligible taxpayers deductions for the designated educational expenditures without regard to whether the expenditures were made on behalf of public school children, nonpublic nonsectarian school children or nonpublic sectarian school children. It provides for a genuine tax deduction.

II. The purpose of the present statute is a properly secular one designed to promote adequate educational opportunity for all children who are required by Minnesota law to attend schools. To that end, the challenged statute has a valid secular legislative purpose.

III. The statute in question has been in existence for over twenty-seven years. Since no evidence of entanglement of church and state has risen during that period of time, it is reasonable to assume that the danger of excessive entanglement is not present. This statute does not require involvement by the state in church matters. Rather, the statute provides that an individual taxpayer may claim a deduction, which would be subject to audit, with the taxpayer having the burden of establishing his eligibility for the deduction.

ARGUMENT

I. MINN. STAT. §290.09, SUBD. 22, PROVIDES FOR A COMPREHENSIVE SYSTEM OF EDUCATIONAL TAX DEDUCTIONS WIDELY DISTRIBUTED AMONG ALL ELIGIBLE TAXPAYERS WITHOUT REGARD TO THEIR RELIGIOUS PREFERENCES OR AFFILIATIONS AND, THEREFORE, DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

A. BACKGROUND.

The statute in question sets forth a number of deductions that a Minnesota taxpayer may take on his income tax return. The statute is comprehensive in that it provides for deductions for every conceivable type of educational expense reasonably related to compulsory education. It is not limited to only those types of expenses peculiar to nonpublic schools.

An important consideration is that the Minnesota law allows a genuine tax deduction. A tax deduction can be easily contrasted to a tax credit. A tax credit grants to a taxpayer a predetermined or arbitrary reduction which results in a definite tax benefit. A tax deduction, on the other hand, results from actual expenses incurred by a taxpayer. Under the Minnesota law, that deduction is available to taxpayers only for the actual amount he has paid to others, up to a stated maximum, for carefully defined educational expenses. Such a deduction does not automatically result in a tax benefit.

The trial court found that the statute provided tax relief in three broad categories of educational expenses, namely, tuition, transportation and textbooks. *Mueller v. Allen*, supra, 514 F.Supp. at 1000 (D. Minn. 1981). The Court went on to detail the various subcategories of each of these categories of deductible expenses.

"Tuition" includes eight subcategories of expenses, namely: (1) tuition in the ordinary sense; (2) tuition charges to public school students who attend public schools outside their residence districts; (3) certain summer school tuition; (4) the tuition charged by a school for private tutoring of slow learners; (5) tuition for instruction for those who are physically unable to attend school; (6) tuition charged by a private tutor for instruction that is acceptable for credit; (7) Montessori school tuition; and (8) tuition for driver's education which is part of the school curriculum.

"Transportation" includes three subcategories of expenses, namely: (1) transportation of students in districts that do not provide free transportation; (2) transportation of students who live in one district but attend school in another; and (3) transportation of students who attend school in their residence districts but who live too close to school to qualify for free transportation.

"Textbooks" include ten subcategories of expenses, namely: (1) textbooks in the traditional sense; (2) tennis shoes and sweatsuits required for physical education; (3) camera rental fees for photography classes; (4) ice skates rental fees paid to the school; (5) rental fees for calculators for math classes; (6) home economics materials needed for minimum course requirements; (7) special metal or wood needed to meet minimum shop class requirements; (8) supplies needed to meet minimum art class requirements; (9) rental fees for musical instruments; and (10) pencils and special notebooks for various classes.

Petitioners argue that the major economic benefit of the statute provides disproportionate aid to the parents of children attending sectarian schools. Petitioners' Brief at 42. In support of this allegation, Petitioners rely upon the same flawed

statistics presented in the lower courts. They argue that the major economic benefit of the statute flows from the tuition deduction and seek to show, by implication, that since nonpublic schools charge tuition and public schools do not, it is the sectarian schools that derive the benefit of the tuition deduction.

Petitioners' argument ignores a number of factors. First, besides tuition in the ordinary sense, there are seven additional subcategories of tuition as likely to be paid by public school taxpayers as by nonpublic school taxpayers. Secondly, this argument ignores the substantial deductions available to nonpublic, *nonsectarian* school parents.

Petitioners' reliance on the fact that the state loses about 2.4 million dollars a year because of the tuition deduction is misplaced. That dollar figure is for the revenue loss by reason of deductions allowed under the challenged statute. (JA-5). Petitioners have failed, however, to present any evidence that reliably relates the estimated revenue loss to tuition deductions taken by sectarian school parents as opposed to public school or nonpublic nonsectarian school parents. If one considers the many subcategories of tuition deductions which are likely to be taken by public school parents alone, the revenue loss figure becomes meaningless.

Petitioners argue further that the fact that the statute on its face makes the deductions available to public school parents is mere "window dressing". Petitioners' Brief at 42. Petitioners fail to place proper emphasis on revenue receipts by public school districts from charges for tuition and fees relating to education. Rather than constituting mere window dressing, the facts have shown these expenditures for deductible expenses by public school students to be substantial. During 1978-79, expenditures for tuition for public school students

were in excess of two million dollars and revenues from fees from public school students amounted to nearly one million dollars. Affidavit of Ronald Moir. (JA-38). These figures do not even include driver education receipts for the summer which must be assumed to be high.

Thus, the public schools can demonstrate receipts of nearly three million dollars for one school year from tuition and fees alone. This fact, together with the other subcategories of tuition which are as likely to be paid by public school students as by nonpublic school students, clearly shows that the statute provides substantial economic benefits to public school parents. Added to that are the substantial deductions available to nonpublic, nonsectarian school students. Given these facts, Petitioners' agrument that the statute principally benefits the parents of children attending sectarian schools is untenable.

B. PRIMARY EFFECT.

The second part of the three part test mentioned in *Lemon*, supra, is that the primary effect of the law must neither advance nor inhibit religion. Tax support of education is constitutionally permissible even if one of the effects of such support is that religious and other nonpublic schools are incidentally and indirectly benefited. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977).

In discussing the primary effect test, two important considerations must be recognized. The first is that indirect or incidental benefits to religious institutions will not invalidate a law. As the Court in *Nyquist*, supra, at 771, stated: "It is equally well established, however, that not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon reli-

gious institutions is, for that reason alone, constitutionally invalid."

The second consideration is that as long as the law presents a neutral posture, it will not fail the primary effect test. As the Court points out in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 747 (1976):

> . . . [R]eligious institutions need not be quarantined from public benefits that are neutrally available to all.
>
> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.

Petitioners rely chiefly on *Nyquist*, supra, in arguing that the present statute has the primary effect of advancing religion. Petitioners argue that the statute, both in form and in substance, is indistinguishable from *Nyquist*. Petitioners' Brief at 61. In *Nyquist*, the Court invalidated a statute that provided for direct grants to nonpublic schools for building maintenance and repairs, allowed reimbursement to certain low-income parents for money paid to send their children to nonpublic schools and provided tax credits for parents who paid money to send their children to nonpublic schools.

The statute in *Nyquist*, unlike the Minnesota law, was simply not a true tax deduction statute. It provided tax benefits only to those who had nonpublic school dependents. It provided for direct grants or reimbursement of expenditures to either nonpublic schools, pupils or parents of such pupils.

The Minnesota law, on the other hand, is clearly distinguishable from the law invalidated in *Nyquist*. The present law makes available to all eligible taxpayers deductions for the designated educational expenditures without regard to whether the expenditures were made on behalf of public school children, nonpublic nonsectarian school children, or nonpublic sectarian school children. All Minnesota taxpayers who spend money on behalf of their elementary or secondary school dependents in one or more of the three categories of deductions may share in the benefit of the law. In no event is the school itself a direct beneficiary of the law.

If one examines those cases where the Court has upheld statutes which provide benefits to private, sectarian schools, such cases are distinguishable by the fact that in each the assistance was neutral and served primarily to benefit the nonreligious activities of sectarian schools. In each such case, the neutral assistance had an indirect effect of benefiting the sectarian institution but such indirect benefit was not reason to find the provisions constitutionally invalid. *Everson v. Board of Education*, supra; *Board of Education v. Allen*, supra; and *Tilton v. Richardson*, 403 U.S. 672 (1971).

If one also examines cases such as *Nyquist*, supra, where the Court has invalidated statutes as violative of the establishment clause, it is evident that in such cases the purpose of the law was to provide assistance to private schools, primarily private sectarian schools. In such cases, the primary effect is financial assistance for nonpublic, sectarian schools.

In *Nyquist*, supra, at 790 n. 49, the Court specifically deferred any decision as to whether a genuine tax deduction would be constitutionally permissible under the "neutrality" test in *Walz v. Tax Commissioner*, 397 U.S. 664 (1970). The Minnesota law provides for such a genuine tax deduction as

opposed to the tax credit invalidated in *Nyquist*. Under the Minnesota law, to be eligible for such a deduction, a parent must make an actual expenditure for a defined secular purpose. Thus, a taxpayer's benefit is solely related to such expenditures. Since this deduction is available to the parents of all school children, public or nonpublic, sectarian or nonsectarian, it is constitutionally neutral and does not violate the establishment clause. Any benefit which is granted to sectarian schools by the statute is indirect and incidental.

Petitioners cite *Norberg*, supra, as a case in which a tax deduction similar to that involved here was invalidated. However, as was found by the Court below, *Norberg* is distinguishable from this case. First, the Court in *Norberg*, supra at 861, distinguished *MCLU v. Roemer*, supra, by saying that the benefited class there was presumed to have primarily secular characteristics and, therefore, the law was valid under *Walz*, supra.

Second, and more importantly, the *Norberg* Court found that most of the Rhode Island parents who were eligible for the tuition deduction sent their children to sectarian schools. Supra at 859. However, in arriving at that conclusion, the *Norberg* Court relied upon an anlysis completely at odds with that of the lower courts in this case. In making its finding of fact as to the percentage of parents who were eligible for the challenged tuition deductions and who sent their children to sectarian schools, the Disrict Court in *Rhode Island Federation of Teachers v. Norberg*, 479 F.Supp. 1364, 1366 (D.R.I. 1979) simply added the number of tuition-paying children who attended nonpublic schools in Rhode Island to the number of students attending public schools in Rhode Island on an other than tuition-free basis. After combining these figures, the Court found that these were the children whose parents were

eligible for the tuition deduction and that these children overwhelmingly attended sectarian schools.

It is obvious that the *Norberg* Court, unlike the lower courts in this case, did not examine the types of comprehensive expenditures which would qualify as "tuition" under the Minnesota law. Thus, the *Norberg* Court did not include expenditures for summer school tuition, for tuition charged by a school for private tutoring of slow learners, for tuition for instruction for those who are physically unable to attend school, for tuition charged by a private tutor for instruction that is acceptable for credit, for Montessori school tuition and for tuition for driver's education which is part of the school curriculum.

It is clear that *Norberg*, supra, is distinguishable from this case. There is no real conflict between it and the decision in this case since the Court in *Norberg* did not make the same findings of fact as to what constituted eligible deductions under the challenged statutes.

The Minnesota law is further distinguished from the law found unconstitutional in *Norberg* by the fact that the Minnesota statute does not automatically produce a tax benefit. Only if an eligible deduction allows a taxpayer to move to a lower tax bracket does he gain a benefit under the statute.

The Minnesota law provides for a genuine tax deduction. It provides benefits to all taxpayers without any distinction as to whether the taxpayer's children attend schools which are public or nonpublic, sectarian or nonsectarian. It does not have the primary effect of advancing religion. Any benefit to religious institutions is indirect or incidental and will not invalidate the statute.

II. MINN. STAT. §290.09, SUBD. 22, HAS A SECULAR LEGISLATIVE PURPOSE.

The promotion by the state of education which will fulfill the basic educational requirements of law and also encourage diversity of ideas is a proper secular function. Even in cases in which the courts have declared statutes to be violative of Establishment Clause proscriptions, those Courts have invariably found the existence of a proper legislative purpose. For example, in *Committee for Public Education v. Nyquist*, supra at 773, the Court, in striking down certain direct financial aids to nonpublic schools and parents of nonpublic school children, nevertheless recognized the valid secular purpose of the law in question.

Petitioners contend that the intent of the Minnesota legislature is to grant benefits to religious institutions rather than aiding education generally. However, Petitioners fail to present any evidence or reasonable argument in support of this contention.

The purpose of the present statute in Minnesota is a properly secular one designed to promote adequate educational opportunity for all citizens who are required by Minnesota law to attend schools and meet the requirements of curricula prescribed by the state. Petitioners' belated argument that the amendments to the statute demonstrate an impermissible purpose are misplaced in light of almost thirty years of history of the legislature's interest in promoting education in this state.

III. MINN. STAT. §290.09, SUBD. 22, DOES NOT FOSTER EXCESSIVE ENTANGLEMENT OF CHURCH AND STATE.

The Petitioners' argument that the challenged statute fosters excessive entanglement between church and state was best addressed in *MCLU v. Roemer*, 452 F.Supp. 1316, 1318 n. 1 (D. Minn., 1978):

> . . . [T]he Supreme Court has implicitly recognized that the church-state contacts occasioned by normal tax administration procedures do not give rise to excessive and unconstitutional entanglements between government and religion. *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 1414-15 (1970). In that case, the court upheld New York City's exemption of church property used solely for religious purposes from real estate taxation. Obviously, administration of such an exemption requires a finding by some official that a given parcel of realty is used for genuine religious purposes. However, this administrative interface between the tax official and the church property was insufficient to create an entanglement problem. The administration of the challenged statute will foster even less entanglement since the eligibility of schools whose students may make use of the deduction is not determined by an indepth case-by-case analysis of the genuineness of the schools religious functions. Rather, eligibility is clearly established if a school meets certain entirely secular requirements—non-profit status, compliance with compulsory attendance laws, and adherence to State and Federal Civil Rights Statutes.

This statute has been in existence for over twenty-seven years. During that period of time, no evidence of entanglement has arisen either in the sense of intrusion by the state into the affairs of the church or by the creation of political and religious divisiveness.

The absence of entanglement during this period of time is obvious when one examines the administration procedures involved in the enforcement of the statutes. The state's only concern with the school is whether it can legally fulfill the compulsory education requirements and whether it can verify the taxpayer's claimed expenditures.

This individual taxpayer claims the deduction on his tax return. Thus, the taxpayer has the burden of proving the amount and eligibility of any claimed expenditures. The school's only involvement in this aspect would be to verify a given expenditure which would have been made to it.

Petitioners focus their entanglement argument on the claim that the state must conduct an exhaustive audit to ensure that the expenditures are used for secular purposes only. Petitioners have failed, however, to understand the tax administration procedures which are involved. No surveillance or inspection of activities performed by religious institutions is made. The contacts with the school itself are minimal. It is the individual taxpayer who is subject to audit.

If, as Petitioners allege, this statute fosters excessive entanglement, some actual evidence of the impermissible interaction would have surfaced in twenty-seven years of enforcement by the state. In the absence of such evidence, it seems fair and reasonable to assume that the danger of excessive entanglement is not present with the statute in question.

CONCLUSION

In arguing for or against the constitutionality of a law under the Establishment Clause, it is sometimes easy for one to take a hypertechnical approach and to apply rules without regard to an examination of the high principles and values from which those rules have been derived. One must not, however, lose perspective and become shortsighted and inflexible in his analysis.

Opponents of the kind of law under consideration seem often to have lost sight of the constitutional principles and have erroneously concluded that any law which incidentally and secondarily benefits persons who choose to exercise religious beliefs, and any law which sustains any interaction between church and state is unconstitutional. In short, they have insisted that "benevolent neutral¹ty" be translated into "opposition" and that "unentangling interaction" be understood to mean "isolation".

Minn. Stat. §290.09, subd. 22 is a neutral tax statute that neither advances nor impedes religion. The statute has a proper secular legislative purpose and is administered in a manner which does not foster excessive entanglement. For these reasons, the statute is constitutional and not violative of the Establishment Clause of the First Amendment. Accordingly, this Court is urged to affirm the judgment of the Court of Appeals.

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No. 82-195

Office - Supreme Court, U.S.
FILED
APR 11 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER and JUNE E. NOYES,

Petitioners,

—v.—

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I. MINNESOTA'S ATTEMPT TO PERMIT PARENTS TO DEDUCT ORDINARY TUITION PAYMENTS WHICH, AS A MATTER OF MINNESOTA LAW, MAY BE INCURRED SOLELY BY PARENTS OF CHILDREN IN PRIVATE SCHOOLS IS NOT "NEUTRAL" WITHIN THE MEANING OF THE ESTABLISHMENT CLAUSE

Respondents argue that Minnesota's decision to permit parents of children attending sectarian private schools to reduce their state income tax payments by deducting ordinary tuition payments to such schools in computing Minnesota taxable income does not violate the Establishment Clause because it is part of a "neutral" attempt to permit parents to deduct "educational expenses" in computing taxable income.

In fact, Minnesota has combined under the rubric "educational expenses" a number of expenditures, some of which may

be borne in common by parents of children in both public and private schools,[1] and some of which are -- as a matter of Minnesota law -- payable solely by parents of children in private schools,[2] 96 percent of whom attend a sectarian school. Petitioners believe that since the economic benefits generated by Minnesota's scheme flow disproportionately to the parents of children attending sectarian private schools, the entire statute is in violation of the Establishment Clause.[3]

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1. Driver's education fees and summer school tuition for non-required courses are the principal examples of such relatively trivial "common" expenses.

2. Ordinary tuition and the cost of curricular supplies are the principal examples of such purely private expenses. Minnesota law forbids the charging of tuition and fees for the ordinary public school curriculum. The sole exception is a de minimis category of children (totalling less then 100) who attend school out of their school district.

3. Respondent Allen's attempt in Appendices A and B of his brief to illustrate the
(Continued on following page)

At an absolute minimum, however, those educational expenses -- such as ordinary tuition -- which, as a matter of Minnesota law, may be incurred only by parents of children in overwhelmingly sectarian private schools, cannot be treated as "neutral" deductions, whatever the treatment of the "common" expenses might be. It is one thing to provide for the deductibility of an expense which may be incurred by the general public; it is quite another to permit the deduction of an expense which as a matter of Minnesota

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(Continued from previous page)
general availability of the deduction, in fact, demonstrates precisely the opposite. Respondent's figures demonstrate that in 1980 approximately 52.2 percent of returns claiming educational deductions accounted for only 11.6 percent of the dollar deductions. These relatively trivial "common" deductions were dramatically outweighed by far larger deductions for ordinary tuition which caused approximately 90 percent of the dollar deductions to be concentrated in fewer than half the returns.

law may be incurred only by parents of children in private, overwhelmingly sectarian, schools. Thus, whatever the constitutionality of Minnesota's scheme as applied to "common" expenses, the attempt to apply it to ordinary tuition expenses payable solely in connection with private schools which are overwhelmingly sectarian in nature cannot satisfy the neutrality principle which even respondents concede is critical to Establishment Clause analysis.[4]

---

4. It is questionable whether, minus the ordinary tuition deduction which is its most significant feature, the Minnesota statute would generate any substantial economic benefit to parents of children attending sectarian schools. Where, as here, a clearly unconstitutional deduction is linked with lesser deductions of merely doubtful constitutionality, this Court may either invalidate the entire statute or invalidate the clearly unconstitutional deduction and remand for a hearing on severability.

II. MINNESOTA'S ATTEMPT TO PROVIDE A TAX DEDUCTION FOR FEES EXPENDED TO PURCHASE A RELIGIOUS SERVICE VIOLATES THE ESTABLISHMENT CLAUSE

Respondents argue that Walz v. Tax Comm'r, 397 U.S. 664 (1970), blasted a loophole in the Establishment Clause which permits the Minnesota legislature to subsidize the purchase of a religious service in the guise of an income tax deduction, despite the fact that all agree that an overt government payment to the religious institution or to the taxpayer would clearly violate the Establishment Clause. If respondents are correct in arguing that the government may award through the medium of tax forgiveness the very subsidy it is forbidden to award openly, the Establishment Clause will have been reduced

to a formalistic shadow. Indeed, if respondents are correct in arguing that the logic of Walz drains the Establishment Clause of real meaning, serious doubt must exist as to the correctness of the Walz decision.

It is, however, unnecessary to choose between the "benevolent neutrality" of Walz and the virtual repeal of the Establishment Clause urged by respondents. Where, as here, a taxpayer seeks to purchase an overtly religious service,[5] the grant of a tax deduction keyed to the payment of a fee for that service constitutes an obvious form of government subsidy of a

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5. This Court has repeatedly recognized that the basic purpose of a parochial primary or secondary school is the teaching and inculcation of religious values. Parochial school tuition is, therefore, a fee for the performance of a religious service.

specific religious activity.

It is true, of course, that other narrowly defined user fees -- such as medical expenses and interest deductions -- are singled out for favorable treatment by the Internal Revenue Code. Whenever the government targets a particular economic transaction and grants a tax benefit keyed to the payments of the user fees involved, the government subsidizes that transaction fully as much as if it made a direct payment to the participants. What differentiates medical deductions from parochial school tuition deductions is not the degree of subsidy -- each is a form of subsidy -- but the existence of the Establishment Clause which forbids government subsidies of religious activities. Thus, whatever the validity of Walz narrowly confined to its facts, it cannot be expanded to allow

government tax subsidies of the overtly religious decision to seek a parochial education for one's child without effecting the virtual repeal of the Establishment Clause and the sub silentio wholesale reversal of two generations of Establishment Clause jurisprudence.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the judgment of the Court of Appeals be reversed and Minn. Stat. § 290.09, Subd. 22, be declared invalid both on its face and as applied to ordinary tuition expenditures.

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MOTION FILED
DEC 9 1982

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE*

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Americans United for Separation of Church and State respectfully moves this Court for leave to file the accompanying Brief in this case as Amicus Curiae. The consent of the Attorney for the Petitioner herein has been obtained, but Counsel for Respondents have refused to consent to the filing of any amicus briefs.

Americans United has a large number of members who have children attending parochial schools and are concerned that the religiosity of parochial schools will be watered down in an attempt to receive tax funds. Several

members of Americans United have suits pending in various courts seeking redress for alleged infringements against their constitutional rights as citizens and taxpayers to be free of "establishment of religion." Americans United and its members believe the decision in this case will have a direct impact on the decisional law affecting such pending cases.

Americans United is particularly concerned with the decision of the Court of Appeals in the instant case because it believes that the Court's opinion extends the "child benefit" theory beyond what this Court has declared to be the verge of constitutionality.

The brief of the Amicus Curiae will argue that the Establishment Clause of the First Amendment made applicable to the states by the Fourteenth Amendment to the United States Constitution has been violated by the Minnesota law providing tax deductions for tuition paid to pervasively sectarian church schools.

Respectfully submitted,

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the Constitution of the United States.

"Americans United" is an organization with some forty thousand members of various religious beliefs and of no

religious belief in all states of the United States, including the State of Minnesota. Americans United is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United for Separation of Church and State has been involved in almost every major parochiaid case coming before this Court dealing with the question of the Establishment Clause of the First Amendment to the United States Constitution, including such cases as *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), and *Meek* v. *Pittenger*, 421 U.S. 349 (1975).

Americans United has a large number of members who have children attending parochial schools and are concerned that the religiosity of parochial schools will be watered down in an attempt to receive tax funds. Several members of Americans United have suits pending in various courts seeking redress for alleged infringements against their constitutional rights as citizens and taxpayers to be free of "establishment of religion." Americans United and its members believe the decision in this case will have a direct impact on the decisional law affecting such pending cases.

Americans United is particularly concerned with the decision of the Court of Appeals in the instant case because it believes that the Court's opinion extends the "child benefit" theory beyond what this Court has declared to be the verge of constitutionality.

SUMMARY OF ARGUMENT

This Court should reverse the Eighth Circuit's decision in *Mueller* v. *Allen*, 676 F.2d 1195 (1982), and should reaffirm *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), in which it held that tax deductions for tuition payments to pervasively sectarian elementary and secondary schools violate the Establishment Clause of the First Amendment.

In effect such tax deductions funnel state financial support to religious schools and bring to them students for religious indoctrination. This Court's approval of such aid would undermine the character and independence of religious schools, open the public treasury to further demands of pervasively sectarian institutions, spawn a whole new generation of parochiaid litigation, and permit additional struggles between civil and religious authorities and institutions over tax funding and conflicts between religion and public policy and controls.

ARGUMENT

THE MINNESOTA TAX DEDUCTION FOR TUITION PAYMENTS, ALTHOUGH FACIALLY NEUTRAL, NEVERTHELESS VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Court of Appeals for the Eighth Circuit in the instant case, *Mueller* v. *Allen*, 676 F.2d 1195 (1982), reaches a result exactly opposite to that reached by the First Circuit in *Rhode Island Federation of Teachers* v. *Norberg*, 630 F.2d 855 (1st Cir. 1980). As the Eighth Circuit noted, the state tax laws in both Minnesota and Rhode Island are practically identical in permitting a

parent of parochial-school students to deduct from gross income for state tax purposes payments made for tuition to church schools, textbooks, and school transportation.

The Eighth Circuit stated that the issue raised is significant not only for the State of Minnesota but to the nation as well. *Mueller, supra* at 120. If this Court sustains the Eighth Circuit's decision, it will open a church-state Pandora's box and permit further raids on the public treasury for the benefit of pervasively sectarian institutions. Such a decision surely would spawn a whole new episode of parochiaid litigation. But if this Court sustains the reasoning of the First Circuit, it will reaffirm the limits it already has mapped out in the parochiaid area. *See* Howard, Baker, & Derr, *Church, State, and Politics* 33 (1981).

In this case the Eighth Circuit subtly seeks to extend further the "child benefit" doctrine inherent in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and embraced in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). The Court of Appeals, by this device, attempts to sidestep the holding of this Court in *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

This Court in *Nyquist* denied the constitutionality of income tax deductions for tuition paid to parochial schools. This Court reasoned that in practical terms for purposes of determining whether such aid has the effect of advancing religion, there is little difference between such tax benefits and tuition reimbursements. In both cases the parents received the same form of encouragement and reward for sending their children to parochial schools. In both instances the money involved represents a charge made upon the state for the purpose of religious education. *Id.* at 790-91.

In the instant case the Eighth Circuit attempted to create a constitutional distinction between the Minnesota statute and the New York statute reviewed in *Nyquist*, stating:

> In *Nyquist* it was urged that the fact that the New York tax credit was directed to the parent rather than to the schools was controlling. The Court, however found that this distinction from *Everson* and *Allen* was not determinative, that it was but one among many factors to be considered. 413 U.S. at 781. A more significant factor that may be extrapolated from *Allen* and *Everson* is the fact that those cases dealt with benefits available to *all* school children, whereas the tax benefit in *Nyquist* was given only to those parents with children in private schools. . . . Thus, the New York statute in *Nyquist* can be distinguished from the Minnesota and Rhode Island statutes on the following basis: . . . the tax benefits in *Nyquist* were limited to the class of parents of private school children, as opposed to the broad class of parents with dependents in both public and nonpublic schools benefited under the Minnesota and Rhode Island statutes.

Mueller, supra at 1203.

In *Everson* this Court acknowledged that the contribution of tax funds for the support of an institution which teaches the tenets of any church is unconstitutional, but reasoned that providing free transportation to children was a safety measure analogous to providing police and fire protection and streets and sidewalks serving churches and parochial schools. In characterizing these public services, this Court stated they were "separate and . . . indisputably marked off from the religious function." *Everson, supra* at 18.

Transportation is in and of itself secular. It may be argued that its principal effect is to get children to school,

rather than to inculcate any theistic ideas, provided that the transportation is generally available to all students and is not limited principally to parochial school students.

In *Everson* this Court, however, said that a state "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Id.* at 16. It is clear that the statute in *Everson, in fact,* extended to students attending church schools transportation services already enjoyed by public-school students. The *effect* of the New York law thus arguably could be deemed to benefit all children by providing them with safe travel to and from school.

Since *Everson* it has been recognized that any arrangement for public benefits to private elementary and secondary schools, including pervasively sectarian schools, carries with it a presumption of constitutional invalidity. *See Tuition Tax Credits Debate,* 7 Hastings Constitutional Law Quarterly 523, 529 (1980).

In *Allen* this Court upheld a New York textbook loan statute which provided for the furnishing of textbooks to students attending both public and private schools. Appellants in *Allen* sought only a declaration that the statute was invalid on its face. *Allen* did not deal with the question of whether the statute was unconstitutionally administered and applied since it was the school board itself that sought judicial relief. *Allen, supra* at 240.

This Court in *Allen* noted that the record was "meager," *id.* at 243, and came before the Court "after summary judgment entered on the pleadings." Significantly, the Court observed that the record contained no evidence that any private schools had previously provided textbooks for their students but that there was some evidence

that they had not. *Id.* at 244, n. 6. The *Allen* Court further observed that there was "[n]othing in this record [that] supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial school to teach religion." *Id.* at 248.

In the case of textbook loans, if the school never furnished the textbooks and if the parents always had furnished the school books, the textbook loan would bring financial assistance to the parent. Though this would make it easier to keep the child in the parochial school, the benefit would not as directly financially benefit the religious school. Also, if only secular textbooks are furnished at least an argument can be made that the books loaned to the students do not aid religion.

There was, of course, good reason why this Court in *Allen* noted there had been no showing that the parochial schools had, prior to the textbook law, furnished textbooks at the schools' own expense. If the record had so indicated, there would have been a more immediate benefit to the parochial school. The state would be providing financial aid to the school rather than to the child even though the books technically were loaned to students.

In the instant case the benefit to religious schools is not as remote. The benefit provided the parents has a much more direct bearing on the financial relationship between the parent and the parochial school. The deduction could be literally the instrument to funnel aid from the state to the school.

While assisting students who attend parochial schools and their parents, the Minnesota legislation also provides an invaluable aid to religious schools by bringing to them and their religious programs the very students for whom

the schools were established. *Gaffney* v. *State Department of Education*, 192 Neb. 358, 220 N.W.2d 550, 555 (1974). *See also McCollum* v. *Board of Education*, 333 U.S. 203,. 212 (1948).

The parochial schools themselves would have a direct interest in any tax benefit provision which might be used as a conduit for aid to such schools. As acknowledged by this Court in *Nyquist*, there is no constitutional distinction between tuition reimbursement and tax deductions. Both ultimately act as a reimbursement to the tuition-paying parent. In both cases the state would be helping to pay for religious education.

In *Nyquist*, this Court discussed its earlier decision in *Allen*, noting:

> The Court there [Allen] repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to distribute religious literature. . . . Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law."

Nyquist, *supra* at 782.

Commenting on *Allen* in *Meek* v. *Pittenger*, 421 U.S. 349, 361 (1975), the Court observed that under the New York law, the textbooks that would be loaned were limited to those " 'designated for use in any public, elementary, or secondary schools of the state or are approved by any boards of education, trustee, or other school authorities.' "

And this Court in *Nyquist*, *supra* at 781-82, observed that in *Allen* it "repeatedly emphasized that upon the record . . . there was no indication that textbooks would be provided for anything other than purely secular courses." The Court also found that "restrictions of textbooks to those provided the public schools is sufficient to insure that the books will not be used for religious purposes."

In *Wolman* v. *Walter*, 433 U.S. 229, 251, n.18 (1977), this Court also noted that "[i]n more recent cases, however, we have declined to extend that presumption of neutrality to other items in the lower school setting." The Court stated that although it had been argued that the Court should extend *Allen* to cover all items similar to textbooks, when faced with a choice between extension of the unique presumption created in *Allen* and continued adherence to the principles advanced in the Court's subsequent cases, the Court would choose the latter course. *Ibid.*

Allen, like *Everson*, validated a program which *in fact* only extended to students attending private schools textbooks such as were already being furnished to public school students. Thus, in both *Everson* and *Allen* all students were in fact actually receiving the benefits.

There is no similarity between the tuition tax deduction plan here under review and the statutes scrutinized by this Court in *Everson* and *Allen*. It can be argued that the benefits provided in both *Everson* and *Allen*, were secular in nature — transportation and books used in secular courses of study. Here the benefit granted by the state relates to the payment for both secular and religious education. Unlike the statutes under review in *Everson* and *Allen*, under the Minnesota and Rhode Island statutes providing for tax deduction for the payment of tui-

tion, textbook, and transportation expenses, a charge is permitted to be made against the state for religious purposes. In fact, the tax benefit to which a parent would be entitled includes payments made to pervasively religious schools. Since there is no way of insuring that the tax benefit and resulting aid to the parochial school would cover only secular services, the statute is invalid. *Committee for Public Education* v. *Regan*, 444 U.S. 646, 659 (1980).

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court in essence held that church-affiliated elementary and secondary schools are pervasively religious or sectarian, thus preventing government grants to partially finance teachers of non-religious or secular subjects in such schools.

In *Meek* v. *Pittenger*, *supra* at 366, this Court recognized that "[t]he very purpose of many of those [church related elementary and secondary] schools is to provide an integrated secular and religious education." The most Reverend William E. McManus, co-chairman of the United States Catholic Conference Ad Hoc Committee on School Aid, stated the same concept this way:

> The Catholic Bishops of the United States are on record in favor of Catholic schools. The Bishops have said in the plainest possible language: Of all education programs available to the Catholic community, Catholic schools afford the best opportunity to realize the central purpose of Christian education among children and young people. Only in such schools can they experience learning and living fully integrated in the light of faith. This integration of religious truth and values with life distinguishes the Catholic schools from all other schools. . . .

McManus, *Felix Culpa — Report from the Ad Hoc Committee on School Aid*, 20 Catholic Lawyer 354 (1974).

Subsequent to *Lemon*, a three-judge panel in *Public Funds for Public Schools of New Jersey* v. *Marburger*, 358 F.Supp. 29, 33-34 (D.N.J. 1974), *aff'd*, 417 U.S. 961 (1973), quoting *Allen* and *Lemon* stated:

> While in some instances it may be that religious values do not affect the content of the secular education provided by these institutions, it is clear that the purposes of such religious-affiliated schools is, in substantial part, to teach and thus advance a given religious faith. The Supreme Court has "long recognized that religious schools pursue two goals, religious instruction and secular education". . . . "[T]he raison d'etre of parochial schools is the propagation of a religious faith."

In *Meek* v. *Pittenger*, *supra* at 364, this Court agreed that as "part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities." This Court, however, confined such permissible aid to "secular and nonideological services unrelated to the primary, religious-oriented educational function of the sectarian school." *Ibid.* Here, under the Minnesota statute, the aid would not be isolated to the secular sphere but would benefit both the parent and pervasively sectarian institutions.

It is respectfully submitted that the opinion of the Eighth Circuit in *Mueller* v. *Allen* places form over substance. On the other hand the First Circuit's decision in *Rhode Island Federation of Teachers* v. *Norberg*, *supra* at 961, recognizes that the legislation, regardless of its carefully drafted language, failed to benefit a class having primarily secular characteristics.

It is the general rule that regardless of the language in which a statute is framed, its purpose and its constitutional validity must be determined by its natural and

reasonable effect. 11 Am. Jur. Constitutional Law § 101, p. 735; *Almond* v. *Day*, 89 S.E.2d 851, 857 (Va. 1955).

Here, apparently to avoid charges of aid to religion, the classification was carefully crafted. However, the attempt fails because it rests entirely upon legislative classifications which are easily manipulated. As the district court stated in *Norberg*, the fact that the statute was made applicable to parents of public as well as nonpublic school students was "mere window dressing." 479 F.Supp. 1364, 1371 (D. R.I. 1979).

The analysis by the Eighth Circuit in *Mueller* runs into serious trouble partly because the Court apparently failed to explore and determine whether the law had a primary *effect* of advancing religion without reference to its legislative purpose.

This Court has declared that a secular purpose and a facial neutrality may not be enough. A court upon a First Amendment challenge must give the effect of the legislation its careful scrutiny. *Nyquist*, *supra* at 794-98, *Meek* v. *Pittenger*, *supra* at 365, n.15.

Despite the fact that the courts have used the phrase "principal or primary effect" as used in *Lemon*, *supra* at 612, there is no requirement that the court determine whether some permissible effect is the "primary" effect of the law. Rather, unless the unconstitutional effect is "remote and incidental," the Establishment Clause is violated. *Nyquist*, *supra* at 784, n. 39, quoting *McGowan* v. *Maryland*, 366 U.S. 320, 450 (1961). This gloss on the primary effect test can be explained by the fact that the First Amendment prohibits laws "respecting an establishment" of religion, which was noted and emphasized in *Lemon* itself.

The fact that state aid is given in either the form of tuition reimbursements or by tax deductions is not constitutionally significant. The Eighth Circuit attempts to avoid the consistent holdings of this Court where the apparent effect of the legislation is to provide aid to church-operated elementary and secondary schools by focusing not on its effect but on the claimed facial neutrality of the law. However, "[t]he state may not . . . pay for what is actually a religious education, even though it purports to be paying for a secular one, and *even though it makes its aid available to secular and religious institutions alike.*" *Roemer* v. *Board of Public Works*, 426 U.S. 736, 747 (1976) (Emphasis added).

Tilton v. *Richardson*, 403 U.S. 672 (1971), resolved any lingering doubt as to the scope of the effect test. As explained in *Nyquist*, *supra* at 783-84, n. 39:

> Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton*, in which the plurality found that the *mere possibility* that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "*in part* have the effect of advancing religion." 403 U.S. at 683 (First emphasis supplied, second emphasis inserted in *Nyquist*).

Here there is not the mere possibility but rather the probability that the tax benefit provision will, in great part, have the effect of advancing religion.

This Court also should recognize that considerable competition exists between public and private education. *See* McManus, *Felix Culpa*, *supra* at 354-56. The primary beneficiaries of the tuition-tax deduction would be those schools, primarily sectarian, which charge tuition. Once this Court permits the wall of separation to be further pierced by such a scheme, the demand by sectarian school

interests will inevitably increase in the political arena. Of course, the ultimate effect of aid to sectarian education could be the undermining of the religious character and independence of religious schools. Mr. Justice Stewart, dissenting, in *Roemer* v. *Board of Public Works of Maryland*, *supra* at 775, warned of "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission. At the same time the tendency to control that which is state aided will naturally follow with the political and religious processes once again assaulted by the inevitable struggle between civil and ecclesiastical authorities.

In addition, state policy might well disapprove of tax deductions for tuition payments to religious schools that are perceived to discriminate on the basis of either race or creed. State educational and taxing authorities may attempt to impose their views on matters such as teacher certification and school standards on unwilling sectarian schools that find such state regulation contrary to their religious beliefs.

Tax audits would surely follow, not only of the parents-taxpayers, but also of recipient schools. Such state inquiries would not be triggered by an institution's election to claim the benefits of tax exemption but rather from the parent's decision to take the tax deduction. Schools that have historically rejected all forms of state assistance thus unwillingly would be subject to the chilling winds of state intrusion and control.

In its opinion in *Mueller*, *supra* at 1205, the Court of Appeals claimed that this tax-deduction law "falls in the gray area lying between constitutionally-upheld tax exemptions . . . and unconstitutional tax 'credits.' "

It is difficult to see how this case comes anywhere close to the tax-exemption case of *Walz* v. *Tax Commission of*

the City of New York, 397 U.S. 664 (1970). In *Walz* this Court determined that "[t]he hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches." *Id.* at 675.

It is one thing to withhold the taxation of church property. It is quite another to permit a charge to be made upon the state through the granting of a tax deduction or by providing for tuition reimbursements. The former simply spares the exercise of religion from the burden of property taxation, *id.* at 673, and perhaps is even required by the Free Exercise Clause. *Id.* at 692, n. 12. (Mr. Justice Brennan, concurring). The latter is the affirmative granting of a reward not required by the Free Exercise Clause. In addition, unlike church taxation, there would be no church-state entanglement by voiding the tax-deduction provision. Conversely, excessive governmental entanglement with the religious interests of the taxpayer and the parochial school may well be the fruit of a tax deduction for tuition, textbooks, and transportation, which can only be verified by tax audit.

The basic weakness in the application of the child benefit concept such as here applied is that it permits public funds to be used for strictly religious purposes. Any further expansion of the child benefit concept would virtually eradicate any limitations on state aid to sectarian schools. The doctrine may be used to justify any type of aid because there is no logical stopping point. *See California Teachers Association* v. *Riles*, 176 Cal. Rptr. 300, 29 Cal.3d 794, 632 P.2d 953 (1981).

If the reasoning of the Eighth Circuit is affirmed by this Court, tax funds could be used for religious purposes so long as the funds are laundered through a child or his parents and made available for both public and parochial school charges.

CONCLUSION

For the reasons stated above, the decision of the Eighth Circuit should be reversed.

Respectfully submitted,

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MOTION FILED
DEC 9 1982

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-195

MUELLER, et al.,
Petitioners

VS.

ALLEN, et al.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The Baptist Joint Committee on Public Affairs respectfully moves this Court, pursuant to Rule 36.3 of its Rules, for leave to file the accompanying brief amicus curiae in support of petitioners in Mueller v. Allen, No. 82-195.

The consent of the parties to the filing of the attached brief has been sought by the moving party. Petitioners' attorney did not respond to a request for permission to file; respondents, as a matter of policy, withheld their consent. Amicus, accordingly, proceeds under Rule 36.3.

The Baptist Joint Committee on Public Affairs is composed of representatives elected by eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention.

The Committee, in part, seeks to

apply the traditional Baptist concerns for religious liberty and proper church-state relations to public affairs. It is the position of amicus that important elements of the establishment clause of the First Amendment are at risk in the case at bar and that Baptist insights will not be presented to the Court unless this brief amicus curiae is considered by this Court.

Therefore, amicus prays this Court grant this motion and consider its accompanying brief which gives the bases and arguments for its support of petitioners' position.

Respectfully submitted,

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QUESTION PRESENTED

May the State of Minnesota permit $500.00 and $700.00 income tax deductions for parents who pay tuition to elementary and secondary schools when the benefits flow overwhelmingly to parents who send their children to sectarian nonpublic schools without offending the "no establishment" clause of the First Amendment?

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BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS *AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.;

Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The Baptist Joint Committee has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle. Religious liberty is also a fundamental legal right protected by the First and Fourteenth Amendments to the Constitution of the United States. It is the opinion of the Baptist Joint Committee on Public

Affairs that the principle of religious liberty and the strictures of the First Amendment have been infringed by §290.09, Subd. 22 of the Minnesota Statutes and by the decision of the United States Court of Appeals for the Eighth Circuit in Mueller v. Allen, _____ F.2d _____ (1982), which is now before this Court on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment XIV, in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statutes §290.09 Subd. 22:

Subd. 22. Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities,

driver's education, or programs of a similar nature.

QUESTION PRESENTED

The decision below raises a fundamental question about the meaning of the clause in the First Amendment: "Congress shall make no law respecting an establishment of religion . . . ." That clause was made applicable to the states by the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940). The question raised is: Did the U.S. Court of Appeals for the Eighth Circuit err in affirming the constitutionality of Minnesota Statutes §290.09 Subd. 22 which provides state income tax deductions to parents of children in elementary and secondary schools when an overwhelming proportion of such tax benefits flows to parents of children in sectarian nonpublic

schools?

STATEMENT OF THE CASE

The facts of this case are clearly and fully stated in Petitioners' Brief on the Merits. Amicus has nothing to add to the facts as stated so, in the interest of brevity, will adopt that statement as its own.

SUMMARY OF ARGUMENT

The argument may be briefly summarized as follows:

1. The Minnesota Legislature, in passing what is now Minnesota Statutes §290.09 Subd. 22, knew or should have known that the tax relief granted would largely flow to parents of children enrolled in sectarian elementary and secondary schools and, for that reason,

its action did not reflect a secular primary purpose.

2. Minnesota Statutes §290.09 Subd. 22 has the primary or principal effect of advancing religion.

3. Minnesota Statutes §290.09 Subd. 22 results in an excessive entanglement of the state with religion both administratively and through the creation of political divisiveness along sectarian lines.

4. The tax deduction provision of Minnesota Statutes §290.09 Subd. 22, by providing public financial assistance to sectarian parochial schools, constitutes state involvement in compulsory religion.

ARGUMENT

Religious groups operate and control elementary and secondary schools -- usually on a financially sacrificial

basis -- for purely religious reasons. In an article, "Why Catholic Schools?", Father Christopher O'Toole, C.S.C., stated:

> The purpose of the parochial school is to permeate with the Faith and the spirit of the Gospels the total educative process. In a parochial school the teaching of religion, for example, is not simply just another subject to be learned and which is not taught in the public schools. No, the entire curriculum is to move forward in an atmosphere of faith in order to produce a pupil who knows, at least in an elementary way, how to relate all knowledge to its ultimate source--God himself. National Catholic Register, August 6, 1972.

This religious reason for being was noted by this Court in N.L.R.B. v. The Catholic Bishop of Chicago , 440 U.S. 490 (1979). Father O'Toole's description of the religious permeation of the curriculum of Catholic parochial schools also describes the religious permeation of the curriculum of most Protestant schools -- many of which came into existence in part

as a result of the so-called prayer and Bible decisions of this Court. Engel v. Vitale, 370 U.S. 421 (1962); School District of Abington Township v. Schempp, 374 U.S. 203 (1963). The court in Essex v. Wolman, 342 F.Supp. 399 (S.D. Ohio 1972), aff'd, 409 U.S. 808 (1972) stated:

> The basic purpose of denominational education is to foster and maintain the teachings of a denominational religion. The religious aspect of the curriculum must be the principal and dominant reason for the existence of such schools.

This Court has declared, in numerous cases, that the establishment clause of the First Amendment forbids the state either directly or indirectly to support or advance religion. Petitioner has documented that of the Minnesota children attending tuition charging nonpublic schools in the 1979-1980 school year 95.44% attended schools considering themselves sectarian. For the 1978-1979 school year the figure was 96.29%. In

that year the parents of the 820,000 students in both public and nonsectarian private schools claimed $5.2 million in deductions, an average of $6.35 per pupil, while the parents of the approximately 85,000 students in sectarian nonpublic schools deducted a total of approximately $12.57 million for an average deduction of $147.81 per pupil. This represents a ratio of 1:23. It is thus evident that the overwhelming proportion of state financial assistance flows to parents of students in sectarian nonpublic schools.

1. Minnesota Statutes §290.09 Subd. 22 does not reflect a secular primary purpose and, therefore, does not meet the first test of constitutionality outlined by this Court in Lemon v. Kurtzman, 403 U.S. 602 (1971).

The difficulty of demonstrating that a legislative body has other than a secular legislative purpose when it passes acts dealing with education in church-

operated and church-controlled elementary and secondary schools without maintaining a detailed, accurate legislative history is granted. It is further granted that, generally, legislative bodies make their own determinations on the issue of constitutionality of their acts and that the courts should usually assume prima facie constitutionality. However, Minnesota Statutes §290.09 Subd. 22 must be considered an exception to the rule.

The Minnesota statute in question is yet another in a long series of attempts by state legislatures, under tremendous pressures from sectarian lobbies, to assist financially hard pressed sectarian schools and avoid this Court's establishment clause tests.

In tort law it is assumed that a person intends the foreseeable results of his action. In this case it becomes evident that the legislators were able

clearly to foresee the results of their action. It is, therefore, logical to assume that in this non-tort situation the legislators intended -- i.e. purposed -- those results.

The legislature could not have been oblivious to the fact that, with few exceptions, public elementary and secondary schools do not charge tuition. It is equally obvious that the elementary and secondary schools which do charge tuition are primarily nonpublic and that those nonpublic schools are overwhelmingly sectarian. The making of an inclusive class of all parents of children enrolled in elementary and secondary schools becomes a farce and a subterfuge when one knows, as the legislators did, that almost all of those who would be able to profit from a tax deduction under §290.09 Subd. 22 would be parents of children enrolled in nonpublic sectarian schools.

Such transparent actions of a state legislature cannot stand up to the close judicial scrutiny required by the First Amendment religion clauses. Whatever the stated purpose, the evident purpose of the Minnesota legislature was to make indirect financial aid available to a predominately sectarian group of elementary and secondary schools. That evident purpose renders §290.09 Subd. 22 unconstitutional. See Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973).

2. Minnesota Statutes §290.09 Subd. 22 does not satisfy the "primary effect" test also described in Lemon v. Kurtzman, supra.

The purpose which the Minnesota legislature evidenced resulted in indirect public financial aid to a class of schools which is predominately sectarian. As such, the tax deductions provided serve to advance religion.

Because this is the principal or primary effect of §290.09 Subd. 22, it is a clear violation of the establishment clause.

The class of schools which charge tuition and to which a taxpayer must pay tuition in order to claim a tax deduction is overwhelmingly sectarian, the instruction in those sectarian schools is impregnated with sectarian religion, and the tax deduction is based on tuition already paid. Parents of children in predominantly sectarian schools are rewarded by preferential tax treatment for the sole reason that they have paid tuition to a largely suspect class of nonpublic institutions. This can only have the principal or primary effect of aiding religion. To claim that indirect aid is not aid is specious reasoning and is contrary to the holdings of this Court.

> [I]t is the use to which public funds are put that is controlling. . . . What may not be

> done directly may not be done indirectly lest the Establishment Clause become a mockery. [emphasis added] Abington v. Schempp, supra, at 230 (Douglas, J., concurring).

It is correct that this Court did permit aid to parents and students in Everson v. Board of Education, 330 U.S. 1 (1947) and Board of Education v. Allen, 392 U.S. 236 (1968), but in these cases the class of students was broad and the aid provided -- transportation and state-approved textbooks -- was ideologically neutral. In the case at bar the opposite prevails. The class is predominantly sectarian and the aid -- tuition assistance -- is not ideologically neutral. The effect, therefore, is an affront to the establishment clause and cannot stand.

> The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.

Everson, supra, at 24 (Jackson, J., dissenting).

3. Minnesota Statutes §290.09 Subd. 22 engenders excessive entanglement between government and religion.

This Court enunciated the doctrine of excessive entanglement of government with religion in Walz v. Tax Commission, 397 U.S. 664 at 674 (1970), to set some standards for constitutionally permissible church-state interactions under the establishment clause. The doctrine was elaborated in Lemon v. Kurtzman, supra, as was the distinction between administrative and political entanglement. Either excessive administrative or political entanglement between the state and religion will render a statute unconstitutional. This Court in Essex v. Wolman, supra, and Committee for Public Education and Religious Liberty v. Nyquist, supra, further emphasized the constitutional necessity to avoid excessive entanglement

of government with religion. Section 290.09 Subd. 22 provides indirect public financial assistance to sectarian elementary and secondary schools. Financial assistance of this type must result in excessive entanglement of government with religion.

Essex v. Wolman, supra, stated that the criteria for determining administrative entanglement as a result of aid given to religious schools are: (1) the use to which the aid is put, (2) the form in which the aid is provided, (3) the person or institutions to which the aid is directed, and (4) the extent to which the state must intervene to determine that the aid is spent constitutionally -- i.e. for secular purposes.

We have shown that tax deductions were largely provided to parents of children in sectarian schools -- which overwhelmingly dominate tuition charging

schools in Minnesota -- and were tied to tuition actually paid to them. The aid was given in the form of tax deductions which appear to be almost identical with the type of indirect aid to sectarian elementary and secondary schools declared unconstitutional by a three judge court in Kosydar v. Wolman, 353 F.Supp. 744 (S.D. Ohio 1972), aff'd sub nom Grit v. Wolman, 413 U.S. 901 (1973). This Court has held that the use of a conduit to provide indirect financial assistance does not cure the constitutional defects of such assistance. Essex v. Wolman, supra. The first three Essex criteria for determining excessive administrative entanglement, when applied to Minnesota Statutes §290.09 Subd. 22, show that this Section does produce excessive administrative entanglement.

On its surface §290.09 Subd. 22 provides for less direct state

administrative intervention in sectarian elementary and secondary schools than have previously invalidated attempts to aid such schools. However, if public financial assistance is given either directly or indirectly for any purpose, it is axiomatic that those who supply the aid and those who receive it must be held accountable. Basic canons of public policy and responsibility are involved.

It is this fourth Essex criteria for excessive administrative entanglement which presents the legislatures with a dilemma from which they will find it difficult to extricate themselves either legally or logically. In Lemon v. Kurtzman, supra, and DiCenso v. Robinson, 403 U.S. 602 (1971), it was held that the administrative rules established were such that the government was excessively entangled with religion. Ohio's legislature then passed a tuition

reimbursement act which is analogous to the act challenged in this case. In Ohio a portion of tuition paid to an almost identical class of schools was returned to parents who had children enrolled in those schools. No restrictions were set by the state to guarantee that the reimbursed tuition money would be spent for non-religious purposes. This lack of administrative control was held to be a defect by a three judge court in Essex v. Wolman, supra:

> The parent has voluntarily undertaken an obligation to pay tuition to a non-public school and the school in return has agreed to educate that child in an atmosphere oriented, if not dominated, by the teachings of a specific religion. At the end of the transaction, the parent has applied for and received reimbursement from the State . . . solely and specifically because he has paid that sum to the denominational school. . . . Since the parents in this scheme serve as mere conduits of public funds, the State retains a responsibility of insuring that the public moneys thus provided and which retain

> their public character throughout the transaction, are used for constitutionally permissible ends and continue to be so used. [emphasis added].

Thus, statutes providing financial assistance to sectarian elementary and secondary schools that are drafted to prevent administrative entanglement are in themselves constitutionally defective because they do not then incorporate sufficient administrative controls to insure that the assistance is used for strictly secular purposes.

> . . . any general purpose aid, lacking non-entangling restrictions on use, constitutes an almost per se violation of the Establishment Clause. Id., at fn. 20.

Section 290.09 Subd. 22, we submit, is defective in this sense also.

Minnesota Statutes §290.09 Subd. 22 fails to satisfy the established criteria for avoiding excessive administrative entanglement; the political entanglement

which this section of the code generates is an additional defect.

In a separate concurring opinion in Walz v. Tax Commission, supra, Justice Harlan emphasized that the Court must look closely at legislation challenged as giving rise to excessive entanglement between government and religion to see if that legislation avoids the "risk of politicizing religion" and "political fragmentation on sectarian lines." 397 U.S. at 695.

In Lemon v. Kurtzman, supra, the Court, in addressing itself to the excessive entanglement caused by political division along religious lines said that though ordinarily

> . . . political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government . . . political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . .

> The potential divisiveness of such conflict is a threat to the normal political process. . . . To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. . . . Here we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified. 403 U.S. at 622-623.

While Minnesota Statutes §290.09 Subd. 22 does not involve annual appropriations, it almost guarantees that political fragmentation and divisiveness on religious lines will be intensified. The amounts of money allowed to be deducted from gross income for Minnesota tax purposes are subject to annual review. If this part of the Minnesota Statutes is allowed by this Court to stand, demands on the political system for increased aid will intensify and divisive religious confrontations would periodically ensue.

As we have said, the schools indirectly given public financial assistance are decisively sectarian. There is a direct relationship between the degree to which a class is sectarian and the degree of entanglement that results. If a class receiving public financial assistance is decisively sectarian, it is essential that the element of entanglement be closely scrutinized. The statute involved in the case at bar does not stand that scrutiny. Inevitable political entanglement at an unconstitutional level is manifest.

4. Minnesota Statutes §290.09 Subd. 22, by providing indirect public financial assistance to sectarian elementary and secondary schools, involves the State in a form of compulsory religion.

The principle of religious liberty antedates the American republic and abhors compulsory religion. Roger Williams wrote: "Forced worship is a stinck [sic] in the nostrils of God" (The Bloudy

Tenent of Persecution); and Thomas Jefferson wrote in the Virginia Statute of Religious Liberty: ". . . no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief" (Sec. II). This is a part of the philosophy bound up in the religion clauses of the First Amendment.

The U.S. Court of Appeals for the Eighth Circuit, in affirming the constitutionality of §290.09 Subd. 22, gave its approval to a scheme which permitted indirect public financial assistance to sectarian elementary and secondary schools. The statistics quoted above and elaborated by Petitioners show that parents of children enrolled in sectarian schools received an overwhelming prepon-

derance of the tax deductions taken under §290.09 Subd. 22. These schools teach sectarian religion throughout their entire academic curricula. The aid to sectarian elementary and secondary schools comes from tax deductions for tuition already paid and constitutes funds which are subject to state control. When public funds, which are collected from all taxpayers regardless of religious belief or lack of religious belief, are used to aid, either directly or indirectly, elementary or secondary schools which teach religion, all taxpayers are compelled to assist in the support of that teaching of religion. State-coerced financial support of religion is one of the oldest and purest forms of the establishment of religion and is clearly at odds with the establishment clause of the First Amendment.

CONCLUSION

The decision by the U.S. Court of Appeals for the Eighth Circuit in the instant case should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John W. Baker, certify that on December 9, 1982 I mailed first class postage paid three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae to each of the following Attorneys of Record in this case:

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MOTION FILED
JAN 31 1983

No. 82-195

In The

Supreme Court of the United States

OCTOBER TERM, 1982

MUELLER, *et al.*,
Petitioners,

— v. —

ALLEN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF THE RESPONDENTS

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The Black Silence of Fear, The New York Times Magazine, Jan. 13, 1952, at 7 20

Blum, Why Inner City Families Send Their Children to Private Schools: An Empirical Study, in Private Schools and the Public Good--Policy Alternatives for the Eighties, (E. Gaffney, Jr., ed. 1981) 15

Brief of Commissioner Clyde E. Allen, Jr., Appendix A and B--Distribution of Dependent Expenditures by Size, Minnesota Department of Revenue, Oct. 28, 1982 19-20

Catholic League for Religious and Civil Rights: J. Cibulka, T. O'Brien, and D. Zewe, Inner City Private Elementary Schools: A Study (1982) 5,6,7,9,10,11,13

Page(s)

Coleman, Public Schools, Private Schools and the Public Interest, Am. Educ., Jan.-Feb. 1982, at 17 (A synopsis of the Coleman-Hoffer-Kilgore Report Public and Private Schools (PPS) 1981) 7,8,9

Giannella, Religious Liberty, Non-establishment, and Doctrinal Development; Part II--The Non-establishment Principle, 81 Harv. L. Rev. 513 (1968) 16

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Greeley, Catholic High Schools and Minority Students, in Private Schools and the Public Good--Policy Alternatives for the Eighties 6 (E. Gaffney, Jr., ed. 1981) 8

R. M. MacIver, The Web of Government 411 (1949) 20

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Reed, Introduction, in Private Schools and the Public Good--Policy Alternatives for the Eighties 3-5 (E. Gaffney, Jr., ed. 1981) 17-18

Sowell, Tuition Tax Credits: A Social Revolution, Am. Educ., July 1982, at 18-19 14-15

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MOTION OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Catholic League for Religious and Civil Rights respectfully moves this Court, pursuant to Rule 36.3 of its rules, for leave to file the accompanying brief *amicus curiae* in support of respondents in *Mueller* v. *Allen*, No. 82-195.

The consent of the parties to the filing of the attached brief has been sought by the moving party. Consent has not been received. *Amicus*, accordingly, proceeds under Rule 36.3.

The Catholic League for Religious and Civil Rights is a civil rights organization national in membership that is concerned with the civil and religious rights of parents in the education of their children, and in particular with the rights of minority parents in educating their children.

The League, in furtherance of these goals, has conducted studies of the inner city non-state schools and advanced their interests in public and non-public forums.

It is the position of *amicus* that the value and true view of these schools is being overlooked and that

these schools and the parents who support them are at risk in the case at bar; that the interests of these minority families across the nation will not be presented to the Court unless this brief *amicus curiae* is considered by this Court.

Therefore, *amicus* prays this Court grant this motion and consider its accompanying brief which gives the bases and arguments for its support of respondents' position.

Respectfully submitted,

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BRIEF OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of The Catholic League for Religious and Civil Rights as amicus curiae in this matter, is set forth in the Motion for Leave to File a Brief Amicus Curiae.

SUMMARY OF ARGUMENT

Minnesota's tax deduction program for educational expenses is a general tax deduction for individuals, not a subsidy to individuals or institutions, and thereby it serves the public interest in quality education for minority children, indeed all children, in a constitutional manner.

Non-state schools are egalitarian and provide minorities a stepping stone out of poverty by furnishing quality education and promoting racial and social integration. The non-state schools, particularly those located in the inner city, embrace the children of this nation's minorities and teach them how to make their way in an educated and affluent country. These schools embody egalitarianism in their very nature and in a

proper and productive sense they impart self-esteem and pride to the minority and ethnic children who attend them. The "partnership" between state and non-state schools sought by true educators who are concerned for the welfare of children is furthered by Minnesota's legislation.

Minnesota's tax deduction for educational expenses is constitutional, just as all charitable and religious tax deductions and health care tax deductions for individuals for services rendered by religious affiliated concerns are constitutional.

ARGUMENT

Constitutional Interpretation of the First Amendment and Public Policy Goals of Educational Development for the Poor and Minorities, for Racial Integration, and for a Fair Tax Policy Would be Threatened by Disallowing the Minnesota General Tax Deduction for Educational Expenses as Unconstitutional.

The State of Minnesota, in the enactment of its education expense tax deduction legislation, is rightfully making a policy decision to promote education--state and non-state. That is the principal and primary effect of this legislation. "Private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," *Board of Education* v. *Allen*, 392 U.S. 236, 247 (1968). It would be absurd to allow tax deductions for expenses relative to maintaining real estate or advancing one's career and not to allow a similar deduction for an investment in the education of children.

The 8th Circuit in *Mueller* v. *Allen*, 676 F.2d 1995 (1982), upheld § 290.09, subdivision 22 of the Minnesota Statutes, authorizing a deduction to gross income for tuition, textbook, and transportation expenses incurred on behalf of dependents attending state and non-state elementary or secondary schools. The deduction is limited to actual expenses incurred up to a $500 maximum per dependent in grades K to 6 and a $700 maximum per dependent in grades 7 to 12.

Deductible expenses are limited to families whose children attend schools which comply with state compulsory attendance laws and are racially non-discriminatory.

A. The Inner City Non-State Schools: A Stepping Stone for Minorities

The emergence of inner city non-state schools as islands of hope in the poorest areas of the nation's urban landscape may be one of the most remarkable phenomena in the history of modern urban education. These schools, though their very existence is precarious, have remained in the hearts of the American cities, embracing and serving generations of minority group children--the children of wave after wave of immigrants struggling to make their way in an alien country. With minuscule resources, these schools have undertaken tasks that have daunted and defeated many educators in the state sector. They are a vital alternative to the state sector, providing quality education to those groups most desperately in need of a way to break out of the vicious and seemingly endless cycle of illiteracy, unemployability and welfare dependency.

The record of these inner city non-state schools, which have been too long ignored and neglected, amounts to little less than a miracle in the heart of our central cities.

The First Amendment has been the cornerstone of our individual rights and freedoms, whose benefits run to all members of our society. To now use that amendment to invalidate the Minnesota statute in question would

be to turn the Religion Clauses on their heads and apply them in a fashion that would allow tax deductions for day care but not for schooling. Doing so certainly would not benefit our nation's children.

An education research project by the Catholic League for Religious and Civil Rights: J. Cibulka, T. O'Brien, and D. Zewe, *Inner City Private Elementary Schools: A Study* (1982) [hereinafter cited as *Inner City*] proves that those at the low end of the socio-economic ladder who seek non-state education do so with the desire of having their children receive *quality education.* A critique of the study will show that for this Court to invalidate legislation such as Minnesota's for other states, is to compel many inner city children to attend inferior and *de facto* segregated school facilities.

The 1978-79 study focuses on non-state inner city schools that have a large percentage of minority representation. In the 54 schools targeted for study, blacks comprised 56% of the children. The second largest group was Hispanics, who made up 31%. Whites accounted for 8% of the total enrollment, while other ethnic groups accounted for 5% of the enrollment. *Inner City* at 32.

The Catholic League for Religious and Civil Rights initiated the *Inner City* study to ascertain who these families are and why they make the sacrifices entailed in sending their children to non-state schools. The study was made in 54 randomly selected inner-city schools in eight cities: Los Angeles, New Orleans, Chicago, Milwaukee, Detroit, New York, Newark and Washington, D.C. The 54 responding elementary schools

serve a total enrollment of 15,312, of whom at least 70 percent are members of racial and ethnic minorities.

The elementary schools, which have an average enrollment of 278 children, are heavily dependent on lay teachers, with only 30 percent of their teachers being religious men and women. *Inner City* at 102. The schools operate under open admissions policies. The expulsion of children is rare, but sometimes students are advised to transfer to a school where more adequate counseling is available. *Inner City* at 142.

The *Inner City* study examines the attitudes of about 4,000 elementary school parents, 339 teachers and 50 principals who responded to the survey. The information provided by the parents reveals who they are (their religion and ethnicity, their economic status, their educational level, their family structure), their perceptions of inner-city schools and, most importantly, their perceptions of the kind of education their children are receiving in these inner-city non-state schools.

B. The Egalitarian Nature of Inner City Non-State Schools Promotes Racial and Social Integration

One of the findings of the *Inner City* study is that although the schools themselves are overwhelmingly Catholic in their affiliation, nearly one-third--31 percent--of the students are Protestants, while 2 percent listed themselves as having no church membership. *Inner City* at 51. Among blacks, however, the proportion of non-Catholics is even higher--with 53

percent reporting that they are Protestant. The vast majority of whites and Hispanics are Catholics.

The egalitarian nature of non-tax-supported schools is evidenced by the way they select and maintain student bodies through admissions and expulsions. According to the study, inner city non-state schools show only a modest propensity toward any admission selectivity and almost no selectivity through expulsions. Rather, by emphasizing socialization, the schools create a distinctive educational environment. *Inner City* at 142.

According to James A. Coleman, in *Public Schools, Private Schools and the Public Interest*, Am. Educ., Jan.-Feb. 1982, at 17 (A synopsis of the Coleman-Hoffer-Kilgore Report *Public and Private Schools* (PPS) 1981) [hereinafter cited as Coleman], tax funded schools are themselves not perfectly integrated in these economic and racial dimensions, and there is already social self-selection within the population when people choose where to live. The question is whether the educational system as it now stands, containing non-state schools, is more segregated along racial grounds than would be a system without non-state schools.

In regard to racial segregation there is a substantial difference between the proportion of blacks in the state sector, the Catholic sector and the other non-state sector; Coleman uses the figures of 14, 6, and 3 percent, respectively. Coleman at 20. Yet, *within* the individual schools in the tax funded state sector, segregation is much higher than the black-white segregation within either of the non-state sectors or in the

total non-state sector combined! Internally the non-state schools are less segregated. Coleman concludes: "If whites and blacks now in private schools were redistributed into the public sector in just the way whites and blacks are now distributed in that sector, there would be no greater and no less segregation than currently exists. Coleman at 21.

Integration is encouraged and achieved through the parents' desires for quality education and for religious and moral instruction. These parental goals find fruition in the non-state schools and result in the enhancement of voluntary social integration. *See* Greeley, *Catholic High Schools and Minority Students*, in Private Schools and the Public Good--Policy Alternatives for the Eighties 6 (E. Gaffney, Jr., ed. 1981). This social integration is being achieved despite federal disincentives. *See* Vitullo-Martin, *How Federal Policies Discourage the Racial and Economic Integration of Private Schools*, in Private Schools and the Public Good--Policy Alternatives for the Eighties, *supra* at 25.

Legislation similar to the challenged Minnesota Statute actually promotes racial desegregation not only in education but in other areas of life as well. With higher quality education available in the cities, middle-class, predominantly white families will have reduced incentives to flee to the suburbs as a way of insuring good education for their children. *See* Graham, *Joining the Discussion: Tuition Tax Credits*, Am. Educ., July 1982, at 13.

Obviously, given their restricted resources, the non-state schools cannot be "all things to all people,"

but according to the *Inner City* study, schools can be distinctive without being exclusive. *Inner City* at 145.

Of course religious affiliation obviously should not be treated as an exclusionary policy. The *Inner City* study showed that even though most of the schools in the study were church-affiliated, the schools were almost evenly split on the matter of giving preference to children with a certain religious affiliation. *Inner City* at 136. This was true for first time enrollees and for transfers from state schools.

Leaving aside the question of religious affiliation, other selection criteria were the parents' motivation, the child's academic ability, the child's behavior, and the perceived motivation of the child. Furthermore, *roughly one-fourth of the schools in the survey used no admissions criteria whatever.* *Inner City* at 136, 137.

The study also found that these inner city non-state schools opened their doors to state school transfers, even in cases where the transfers were clearly not the most desirable or ideal students. *Inner City* at 140. In fact, 35 percent of the schools give no tests in accepting transfer children but simply place the children and work with them. *Inner City* at 141. The schools that do test rarely reject applicants, even though only 6 percent test the same as their peers in the school they are entering. Differences in educational level can be remedied and are remedied in the non-state schools, as the Coleman Report shows. Coleman at 19.

The survey found that a vast majority (80 percent) of the schools reported that they accepted academically weak state school transfers frequently or sometimes. This tendency was less pronounced among pupils with discipline problems, but a majority (56 percent) of the schools reported they accepted such transfers frequently or sometimes. *Inner City* at 139, 140. *See also* table in Appendix A from *Inner City* at 140.

This evidence--that non-state schools often accept pupils with learning or disciplinary problems--demonstrates that the schools are egalitarian rather than elitist institutions. Further, it is evident from the testing results that these schools do not view a child as "academically weak" simply because he may test below grade level. This democratic openness to environmental differences by the schools may account for the positive enthusiasm and sacrifices of the parents--95 percent of whom feel their "opinion matters." Similarly, 98 percent of the parents report that their child talks positively about their schooling--77 percent of the parents make this statement of a positive attitude from their children "strongly." *Inner City* at 144, 152.

The data of the study indicate that parental motivation is the criterion foremost in the minds of school officials, both for first time enrollees and for state school transfers. This suggests that in their admission decisions, officials are concerned primarily with responding to parental concerns and desires for quality education.

C. Minority Families Make Painful Financial Sacrifices in Order to Send Their Children to Inner City Non-State Schools

The deep commitment of minority families to quality education is clearly demonstrated by the sacrifices entailed in their choice of inner city non-state schools. Fifteen percent of the responding families report annual incomes of less than $5,000; another 35 percent report incomes of from $5,000 to $10,000; 22 percent report incomes of from $10,000 to $15,000; 14 percent report incomes from $15,000 to $20,000; and another 14 percent report incomes over $20,000. *Inner City* at 34.

It is noteworthy that 72 percent of families with children in inner city non-state schools report annual incomes of less than $15,000. This constitutes an over-representation of low income families, since only 36 percent of all U.S. families have incomes of less than $15,000. More remarkable still is the fact that 50 percent of inner city non-state school families live on less than $10,000 a year, in contrast to 27 percent of all U.S. families. All but 14 percent of the respondents are members of families whose annual income was below the median income of U.S. families, which was just under $20,000 in 1978. Their income level, in relationship to annual tuition costs, is reflected in the table in Appendix B, from *Inner City* at 38.

One of the misrepresentations by opponents of the challenged Minnesota legislation is that it would cost millions of dollars. What is economically important is that a shift of students to lower-cost non-state

schools can save millions of dollars for society as a whole.

Many non-state schools educate youngsters at costs that are only a small fraction of the cost of state schools. Many non-state schools charge an annual tuition of $600, and the study found a mean tuition rate of $400 for inner city non-state schools. On the other hand, the per child cost of education in some metropolitan school systems approaches $3,000. Old or new mathematics tells us that if we *reduce* the number of children receiving a $3,000 per year state education and *increase* the number of children receiving a $600 high-quality non-state education, the nation as a whole will benefit by reduced educational expenditures and the provision of better educational opportunities.

One of the greatest degradations of poverty is the unavailability of educational choice. Most poor parents in America are suffering that degradation. In the education of their children they have no choice of religious and moral values, no choice of educational environment, no choice to assure dedicated and committed teachers, no choice of personal involvement in the education of their children. The state through its truancy laws forcibly compels parents to send their children to schools, but effectively denies to the poor any choice of school because, generally, family financial limitations make state-operated schooling the only available option. This amounts, in effect, to a compulsory government monopoly in the education of low-income children. The net result is that parental involvement remains only theoretical for most poor people.

Why, then, do many of these poor and powerless parents send their children to inner city non-state schools in old dilapidated buildings, to schools with inadequate facilities and equipment, to schools with teachers grossly underpaid, and in which they themselves are expected to contribute labor and services? In the *Inner City* study, minority parents answered that question in a voice that was virtually unanimous. They send their children to these inner city non-state schools because they want a better education, a quality education for their children. *Inner City* at 10. By quality education, they mean an education that includes religious and moral values, an education with rules and discipline, an education that treats their children with respect, an education provided by teachers and staff who care about their students and the students' self-image, and impress on them high levels of expectation, an education to which they themselves contribute labor and services, an education that makes their children so interested in learning that they discuss school at the dinner table. *See* Appendix C table on parental responses on school quality, from *Inner City* at 63. *See also* Taylor, *The St. Thomas Community School: A Harlem Success Story*, in Private Schools and the Public Good--Policy Alternatives for the Eighties, *supra* at 44.

D. Minnesota's Tax Deduction Program for Educational Expenses Serves the Public Interest in a Constitutional Manner

These inner city non-state schools are one of the truly remarkable developments in American education, and, if given encouragement and time, will become a potent force for the betterment of our society. These schools, structured in order to meet the special needs and aspirations of the individuals who populate the battered and often violent neighborhoods of this nation's central cities, are signs of hope to a near despairing people. Such schools, through the market mechanism of competition, improve the educational quality provided to our children. The Minnesota legislation aids the quality development of all schools.

> Public schools in affluent neighborhoods where parents already have that option [of sending their children to non-state schools] must pay some attention to those parents' wishes and be responsive. But parents in poorer neighborhoods and ghettos have no such leverage to use to get attention, response, or even common courtesy. The mere prospect of being able to remove their children to private schools changes all that. In other words, the benefits of the availability of a tuition tax credit do not end with those who take advantage of it but extend to those who keep their children in the public schools and never collect a dime from the Treasury--but whose

> children's needs now have to be taken seriously by public school officials no longer insulated or assured of a captive audience. Sowell, *Tuition Tax Credits: A Social Revolution*, Am. Educ., July 1982, at 18-19.

Minority parents rightly feel that they have been discriminated against because of their color or ethnicity. Although the battle for civil rights for minorities in the 1960's has changed much of that, the right of meaningful educational choice for minorities is still to be won. State and federal tax policies have severely damaged the inner cities. Moreover, governments have persistently denied education tax funds to parents who choose high quality private schools for their children's education.

In defense of their fundamental rights in education, minority parents are today beginning to protest this denial of education tax funds. Minority parents overwhelmingly support government programs that would assist them in providing for the education of their children in schools of their choice. Blum, *Why Inner City Families Send Their Children To Private Schools: An Empirical Study*, in Private Schools and the Public Good--Policy Alternatives for the Eighties, *supra*, 17, 24.

Now, in the Supreme Court, petitioners are asking that *even* a tax deduction not be allowed to these parents who sacrifice so that their children be educated--even though this Court has recognized that obviously a tax exemption is "qualitatively different" from a subsidy. *Walz v. Tax Commission*, 397 U.S. 664,

689 (1970) (Brennan, J., concurring); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973). *See also* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development; Part II—The Nonestablishment Principle*, 81 Harv. L. Rev. 513 (1968) for a well-done summary of the differences between a tax deduction and subsidy, wherein he observes, "The [tax] deduction is not structured to encourage contributions to religion . . ." *Id.* at 549.

Parents who exercise education choices should not be penalized. Indeed if such educational deductions are claimed to be unconstitutional, what then is the status of all charitable and educational deductions? A tax deduction *is* a policy decision *not* to transfer some wealth from the individual to the state. A tax deduction is not a subsidy collected from all and then distributed to smaller sub-parts. In a subsidy, there is an active movement of funds; in a deduction there is the passive maintenance of the status quo.

In fact, no individual can even claim harm unless it is assumed that the state has an interest in all the productive wealth generated by its people. The fact that the state, through its taxing powers, may take certain assets into its coffers, does not establish that the state owns or controls everything that is potentially taxable. Not to distinguish between the two is to say "Render unto Caesar everything, and be thankful for what he deems to return."

It is these critical differences which distinguish a tax deduction from a direct grant and which hurdle the Minnesota legislation over the serpentine wall of the First Amendment which divides impermissible state

encouragement of religion from permissible benevolent neutrality. As the Court stated in *Walz*, 397 U.S. at 677, "There is no genuine nexus between tax exemption and establishment of religion."

The State of Minnesota is merely making a policy decision to promote education--state and non-state. That is the principal and primary effect of this legislation. Similarly, the bettering of education for our nation's children, not internecine legal battles over turf or economic philosophies, should be the principle by which all are guided in this litigation. It is unfortunate that acrimonious charges and countercharges emanating from various sources have generated more heat than light. *See* amicus curiae briefs of the Counsel for Minnesota Association of School Administrators, et al., the Mountain States Legal Foundation, et al., and the National School Boards Association. No one need fear that a tax deduction for education will create an incentive causing a massive student exodus from state schools to non-state schools, because even with a deduction, non-state school parents will *still* have out-of-pocket expenses greater than their permissible tax deduction.

The overarching national goal of promoting quality education--both state and non-state--is mirrored in the statements of the Hon. Vincent E. Reed, past Superintendent of the District of Columbia Public schools. He states, and all would do well to heed his advice, that:

> If the financial exigency that we experienced in the District of Columbia is symptomatic of

> other public school systems and of many areas of private schools, then it seems to make sense that public education and private education get together somehow to maximize scarce resources in order to make sure that quality education remains possible in this country. In order to achieve the goal of quality education for all, the public sector and the private sector need to enter into a partnership to strengthen one another. . . . My basic feeling is that educators are paid to serve young people and all of us should do that in a combined way so that our young people will be served and will develop no matter where the service comes from. . . . There is much that each sector can learn from the other. Both need to survive, and neither can neglect the other much longer. . . . If such a marriage of minds and energies can be achieved, the children of America will be the winners. Reed, *Introduction*, in Private Schools and the Public Good--Policy Alternatives for the Eighties, *supra* at 3-5.

Nyquist clearly does not stand for the proposition that such an educationally sound and wise policy of "partnership" and cooperation between the sectors is unconstitutional. This "partnership" inherent within the challenged Minnesota tax deduction is exactly the type of benevolent neutrality that Chief Justice Burger had in mind when he stated:

> We will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. *Walz*, 397 U.S. at 669.

Again, it must be asked, if Minnesota's across the board educational deduction is to be held unconstitutional, when will all other educational and charitable deductions be declared unconstitutional as well?

The Minnesota statute is a "general" tax benefit for *all* parents who incur educational expenditures, and is in no way "special tax benefits." *Nyquist*, 413 U.S. at 794. Thus, just as *Nyquist* specifically and correctly exempted from its holding a genuine tax deduction, so the Minnesota legislature acted constitutionally in granting a tax deduction for educational costs, as well as for dental and medical care, which are certainly in some instances also provided by religious and charitable institutions.

Indeed, as budgetary constraints increase for all schools and by necessity funding for all programs is cut back, the use of the education deduction will increase and will become more important for parents whose children attend tax funded state schools. This trend is confirmed by the enhanced use of "user fees" in the state schools to help cover the costs of extracurricular activities and other programs. *See Distri-*

bution of Dependent Expenditures by Size, Minnesota Department of Revenue, Oct. 28, 1982, Appendix A and B of Commissioner Clyde E. Allen, Jr.'s brief.

CONCLUSION

"Our real power," Justice Douglas observed, "is our spiritual strength, and that spiritual strength stems from our civil liberties. If we are true to our traditions, if we are tolerant of a whole market place of ideas, we will always be strong." *The Black Silence of Fear*, The New York Times Magazine, Jan. 13, 1952, at 7, 38.

If we are "tolerant of a whole market place of ideas," we must be tolerant of a diversity of schools, and if we are tolerant of a diversity of schools, we may not individually discriminate against parents and students who pursue quality education in schools of their choice. It would be most tragic for the Constitution to be used as a solvent to weaken a society's bond and dampen the dreams of thousands of parents who seek a better world for their children through better education. A policy which promotes education exclusively by the state potentially plows the furrow for a man who can live exclusively for the state. Such a man, according to R. M. MacIver, is "either a tyrant or a slave." R. M. MacIver, *The Web of Government*, 411 (1949).

For the foregoing reasons, the judgment and opinion of the United States Court of Appeals for the Eighth Circuit should be upheld.

Respectfully submitted,

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APPENDIX A

FREQUENCY OF ACCEPTANCE OF PROBLEM PUPILS IN TARGET INNER-CITY PRIVATE SCHOOLS

Acceptance	Kind of "Problem" Pupil	
How Often	Academically Weak Transfers	Discipline-Problem Transfers
Frequently	32%	6%
Sometimes	48	50
Seldom	14	30
Never	6	14

n = 50 Missing data on 4 schools.

APPENDIX B

ANNUAL FAMILY INCOME AND ANNUAL TUITION COSTS OF FAMILIES IN TARGET INNER-CITY PRIVATE SCHOOLS

Tuition	Annual Income of Families				Totals
	Under $5,000	$5,000-$9,999	$10,000-$14,999	$15,000 and up	
Under $300	37%	19%	14%	13%	18% (644)
$301-$499	38	47	42	33	42 (1511)
$500 and up	25	34	44	54	41 (1469)
Total	100%	100%	100%	100%	101%[1]
	(544)	(1257)	(792)	(1031)	(3624)
	15%	35%	22%	28%	100/101%

n = 3995 minus 371 missing cases.

1 Total is greater than 100% due to rounding.

$X^2 = 244.17$ at df = 6. Significant at greater than .01 level of significance.

APPENDIX C

PARENTAL RESPONSES ON "PRIVATE SCHOOL QUALITY"

Question No. and Statement	Percent Responding[1]			
	Strongly Agree	Somewhat Agree	Somewhat Disagree	Strongly Disagree
35. This school is giving my child a quality education.	53%	41%	6%	0.3%
56. I am confident that I am sending my child to the school that will best educate him/her.	80	18	2	0.4
58. Going to this school will help my child be more successful in the future.	74	24	1	1
40. The attitudes of teachers here, the involvement of parents with the school, the concern for the student has made my child more interested in learning.	67	30	2	1
37. At this school, my child has learned to read and write well.	72	26	2	1
42. This school challenges my child to do his/her best.	80	18	1	1
26. When my child's teacher or principal tells me my child needs to be disciplined, I trust their judgment.	51	43	5	1
36. The people at this school are concerned about my child's personal image.	71	26	2	1
25. After coming to this school, my child's behavior at home has:..[2]	37	33	29	1

1 Adjusted for missing cases. Percentages may not equal 100% due to rounding.

2 The four response choices were "greatly improved", "somewhat improved", "not changed", and "become worse".

MOTION FILED
JAN 27 1983

No. 82-195

IN THE

Supreme Court of the United States

October Term 1982

VAN D. MUELLER and JUNE NOYES,

Petitioners,

-vs-

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN, and DOROTHY DEHAAN,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF CITIZENS FOR EDUCATIONAL FREEDOM, AMICUS CURIAE, IN SUPPORT OF THE RESPONDENTS

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Widmar v. Vincent, 454 U.S. 263 (1981) 7, 17, 18

Wolman v. Essex, 342 F.Supp. 399 (S.D. Ohio), *aff'd mem.*, 409 U.S. 808 (1972) 19

Wolman v. Walter, 433 U.S. 229 (1977).. 2, 3, 7, 10, 11, 12, 13

Other Authorities Cited:

L. Tribe, American Constitutional Law (1968) 17, 20

MOTION OF CITIZENS FOR EDUCATIONAL FREEDOM FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Citizens for Educational Freedom respectfully moves the Court for leave to file the accompanying brief amicus curiae in support of the respondents. Written consent of counsel for the parties has been requested but not yet received.

Citizens for Educational Freedom ("CEF") is a national organization dedicated to preserving the educational rights of parents and children. It is firmly committed to the belief that education of children is primarily a matter of family and personal concern. Throughout its history, CEF has worked through the legislative and judicial processes and through public information programs to further this belief by supporting and advocating freedom of educational choice for all parents, diversity in education, and, above all, quality education for all children.

Consistent with its commitment to parents and children, CEF represents individuals – citizens, taxpayers, and voters – rather than institutions. Its membership is comprised not of schools, nor of education or other organizations, but of persons from all walks of life and all states of the Union. CEF's members include parents of public schoolchildren, private nonsectarian schoolchildren, and church-related schoolchildren of all denominations. As reflected by this diverse membership, CEF is not dedicated to any one religious belief, nor to religion over nonreligion. It is a pluralistic organization dedicated to quality education in all schools, public, private, and sectarian alike.

One of the goals of CEF has been to secure legislative recognition of the prime role of parents in the education of their children through enactment of education expense income tax deductions for all parents. CEF has advocated such programs

in legislatures throughout the nation. It has supported such programs in the past and intends to support them in the future.

The Minnesota statute now before the Court is one example of the type of legislation which CEF advocates. As such, CEF's policies and goals will unquestionably be affected by the outcome of this litigation. By virtue of CEF's national interests and efforts, CEF does not believe that its interests and policies will be articulated or defended by the parties in this case.

CEF recognizes that the constitutionality of state legislation intended to promote quality education for all children, including those in church-related schools, is one of the most difficult and sensitive areas of constitutional jurisprudence. It is CEF's belief that such questions can be resolved only through a carefully reasoned analysis of the principles set forth in this Court's Establishment Clause decisions, and then application of those principles to the facts of the case at hand. CEF seeks leave to submit the attached brief amicus curiae in order to present its interpretation and analysis of these overriding constitutional principles, and thereby to defend its interest in and commitment to legislation which furthers quality education for all children.

Respectfully submitted,

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BRIEF OF CITIZENS FOR EDUCATIONAL FREEDOM AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of Citizens for Educational Freedom, as amicus curiae in this matter, is set forth in the Motion for Leave to File a Brief Amicus Curiae.

SUMMARY OF ARGUMENT

1. In past cases the "effect" element of the three-part purpose-effect-entanglement Establishment Clause test has presented the major constitutional impediment to state income tax legislation designed to provide educational relief. That element is not an "any effect" standard, however, but is concerned with "primary" effect. As Justice Powell made clear in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), three factors have traditionally been indicative of primary effect: (1) whether the benefits are disbursed to individuals rather than institutions, (2) whether the benefits, either by their nature or through the manner of their provision, reflect a sufficient "guarantee of separation," and (3) whether the benefits are made available to a broad class of beneficiaries.

2. Disbursement to individuals rather than institutions strongly favors a finding of permissible primary secular effect, since the effect test is principally an institutional test, concerned with the impact of government programs on religious institutions, not persons.

3. A genuine tax deduction embodies a sufficient "guarantee of separation," since it is a form of government abstention rather than active government involvement with religious interests. Although the resulting separation may not be absolute and total, such absolute separation has never been required.

4. Availability of benefits to a broad class of persons, such as all parents whose children attend school, regardless of the public-nonpublic or sectarian-nonsectarian nature of the school, is a significant indicator of permissible primary secular effect, since such broadly drawn legislation does not involve a danger of symbolic identification of government with religious interests.

5. The Minnesota education expense tax deduction statute reflects each of the factors which are indicative of permissible primary secular effect. Its benefits go to individuals rather than institutions; it is a genuine tax deduction, not a government subsidy; it is broadly drawn legislation with benefits available to all similarly situated persons, without regard to religious or nonreligious attributes. Such a statute should be found constitutional.

ARGUMENT

I. INTRODUCTION: THE OVERRIDING IMPORTANCE OF QUALITY EDUCATION OF CHILDREN

> *The State has ... a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.*
>
> [Justice Powell in *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (separate opinion) (emphasis added).]

Justice Powell's comments ring particularly true in the case now before the Court. The State of Minnesota has sought to facilitate "education of the highest quality" for all its children, "whatever school their parents have chosen for them," by permitting parents to take state income tax deductions for certain expenses incurred in connection with the education of their children. It can hardly be doubted that the State's interest in

this matter is of the highest order.[1] A well educated young citizenry is perhaps the greatest asset a State can have;[2] it ensures that the leaders of tomorrow will be *informed* leaders; it establishes the basis for *meaningful* free thought, speech, and discourse in ideas. Our system of democratic government is founded on the concept of citizen participation in government. Without educated and informed citizens capable of grasping and resolving the complex issues which confront government at all levels, the necessary citizen participation would be largely meaningless at best, lacking altogether at worst. Education of youth is the prime vehicle for transmission of our culture, our heritage, and our social values. As Justice Powell noted in *Wolman*, the *quality* of that education, not whether it comes from a public, private, or church-related school, is the important point.

Legislatures across the Nation have responded in a variety of ways to the need to preserve quality in education. One such response, typified by the Minnesota legislation at issue in this case, has been state income tax deductions for educational expenses. Opponents of these programs argue, however, that this Court's decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), compels the conclusion that all such programs are constitutionally forbidden. Petitioners in this case claim that Minnesota's tax deduction program is indistinguishable from the New York legislation struck down in *Nyquist*. What the opponents fail to recognize is that *Nyquist* was merely one chapter in a continuing constitutional saga. *Nyquist* expressly left open many of the questions that are raised by legislation such as Minnesota's. The purpose of this brief is to demonstrate

---

[1] Compare *Wolman*, 433 U.S. at 240: "There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education." *See also Board of Education v. Allen*, 392 U.S. 236, 247 (1968).

[2] From the opposite perspective, an uneducated and illiterate citizenry is perhaps the greatest liability with which a State can be burdened. Overcrowded prisons and mental institutions and burgeoning welfare and unemployment rolls bear grim witness to the need for all that can be done to improve the social awareness and sense of responsibility of all Americans.

that *Nyquist* is not nearly so forbidding as the opponents wish to believe, but, by virtue of its reasoned analysis of the issues, actually illustrates the factors which a statute must reflect to be found constitutional.

II. THE "EFFECT" ELEMENT OF THE THREE-PART ESTABLISHMENT CLAUSE TEST IS A "PRIMARY EFFECT," NOT AN "ANY EFFECT" STANDARD, AND IS SATISFIED WHERE (1) BENEFITS ARE DISBURSED TO INDIVIDUALS RATHER THAN INSTITUTIONS, (2) THE BENEFITS CONTAIN A SUFFICIENT GUARANTEE OF SEPARATION, AND (3) THE BENEFITS ARE AVAILABLE TO A BROAD CLASS OF PERSONS

A. The Purpose-Effect-Entanglement Test

Justice Harlan once remarked that "it is far easier to agree on the purpose that underlies the ... Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." *Walz v. Tax Commission*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring). His observation is perhaps most accurate with respect to the validity under the Establishment Clause of state educational relief programs which partly benefit nonpublic education. As Chief Justice Burger noted in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), "[c]andor compels acknowledgement ... that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."

Rather than precise "lines of demarcation," what has emerged is a set of three generalized criteria, or, as Justice Powell put it in *Hunt v. McNair*, 413 U.S. 734, 741 (1973), three "helpful signposts." In *Lemon* itself, the Chief Justice set forth what has since become the classic formulation of these factors:

> First, the statute must have a *secular legislative purpose;* second, *its principal or primary effect must be one that neither advances nor inhibits religion* ...; finally, the statute must not foster an *excessive government entanglement* with religion.
>
> [403 U.S. at 612-13 (emphasis added).]

B. Effect, Nyquist, and Educational Relief Tax Legislation

In past cases, the *Lemon* "effect" criterion has proven to be the major obstacle for state income tax legislation intended to provide educational relief. At issue in *Nyquist*, for example, was a New York tax "reduction" program whereby parents whose adjusted gross income was greater than $5,000 but less than $25,000 could reduce their income by a specified amount for each child for whom the parents paid tuition to a nonpublic elementary or secondary school.[3] The Court held that the tax

---

[3]The challenged legislation also involved two other, related programs. First, qualifying nonpublic elementary and secondary schools could receive "maintenance and repair" grants from the State to cover up to 50% of the per pupil costs of school maintenance. Second, parents who had taxable income of less than $5,000 per year could receive nonpublic school tuition "reimbursement" grants of up to $100 per child (but not to exceed 50% of the tuition actually paid). The tuition tax reduction program was designed to pick up where the reimbursement grants left off. However, unlike the reimbursement grants, the tax reductions were entirely unrelated to the amount spent by the parents on tuition. *Nyquist*, 413 U.S. at 789. The amount of the reduction instead was set by the statute and depended exclusively on the parents' adjusted gross income tax bracket. Whatever the amount of the reduction, it was calculated to result in a guaranteed net tax benefit to the parents. For example, a parent whose adjusted gross income was less than $9,000 per year could claim a $1,000 reduction for each child for whom nonpublic school tuition was paid, regardless of whether the amount of tuition actually paid was $50 or $5,000. 413 U.S. at 765-66 & nn. 18-19. Such a reduction was designed to yield a guaranteed net tax benefit to the parents of $50 per child, again regardless of the amount of tuition paid. 413 U.S. at 766. Because of these effects, there was considerable difficulty in characterizing the reductions. According to Justice Powell: "Because of the *peculiar nature* of the benefit allowed, it is difficult to adopt any single traditional label .... It is, at least in its form, a tax deduction .... Its effect ... is more like that of a tax credit since *the deduction is not related to the amount actually spent* for tuition and is apparently designed to yield *a predetermined amount of tax 'forgiveness'* ...." 413 U.S. at 789 (emphasis added). In the end, Justice Powell described the New York tax reductions as "*hybrid* benefits" and "*tax reductions*," 413 U.S. at 789 & 794, (emphasis added), and specifically stated that they were *not* "genuine tax deductions." 413 U.S. at 790 n. 49.

reduction program could not pass muster under the Establishment Clause since its "impermissible *effect*" was to advance "the sectarian activities of religious schools." *Nyquist*, 413 U.S. at 794 (emphasis added).[4] In the post-*Nyquist* cases in which education expense tax legislation has been ruled unconstitutional, each court relied extensively if not exclusively on the *Nyquist* formulation of "secular effect." *See, e.g., Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir.), *aff'd mem.*, 442 U.S. 907 (1979); *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 850 (1st Cir. 1980); *Minnesota Civil Liberties Union v. Minnesota*, 224 N.W.2d 344 (Minn. 1974).

C. Primary Effect, Not Any Effect, Is The Proper Test

The "effect" standard set forth in *Lemon* and applied in *Nyquist* clearly is not an "any effect" test. Although such an extreme reading of *Nyquist* has been adopted by at least one court,[5] the author of *Nyquist*, Justice Powell, has unequivocally dismissed such a contention on numerous occasions.[6] In *Hunt v. McNair*, 413 U.S. 734 (1973), for example, he stated:

> [T]he proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected ....

---

[4] The Court in *Nyquist* had little difficulty in finding that tax legislation designed to provide educational relief, such as New York's tuition tax reductions (and the Minnesota statute at issue here), has a valid "secular purpose." According to Justice Powell: "[W]e do not doubt – indeed, *we fully recognize – the validity of the State's interests in promoting pluralism and diversity* among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools." 413 U.S. at 773 (emphasis added). Compare the Eighth Circuit's comments regarding the purpose of Minnesota's education expense tax deduction statute: "The manifest purpose of the challenged statute is to provide *all* taxpayers a benefit which will operate to enhance the *quality* of education in both public and private schools." *Mueller v. Allen*, 676 F.2d 1195, 1198 (8th Cir. 1982) (emphasis added).

Stated another way, the *Court has not accepted the recurrent argument that all aid is forbidden because aid to*

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[5]In *Minnesota Civil Liberties Union v. Minnesota*, 224 N.W.2d 344 (Minn. 1974), the Minnesota Supreme Court felt compelled by *Nyquist* to reverse the trial court's decision upholding a tuition tax credit statute. The Minnesota court first noted that "absent subsequent decisions of the [United States] Supreme Court," the trial court's finding that the legislation had a permissible secular effect was "fully justified under the standards established ... in *Tilton v. Richardson.*" 224 N.W.2d at 349. According to the Minnesota court, however, the intervening decision in *Nyquist* "effectively changed the course of establishment questions .... In applying the 'primary effects test,' we must be guided by the realization ... that *this is no longer a primary effects test, but an 'any effects' test.* 224 N.W.2d at 350, 353 (emphasis added).

[6]In his separate opinion in *Wolman*, 433 U.S. at 262 (emphasis added), Justice Powell wrote: "No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of ... *Meek v. Pittenger* .... If we took that course, it would become impossible to sustain state aid of any kind – even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions .... The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. *This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest.*" In *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), Justice Blackmun, joined by Chief Justice Burger and Justice Powell, noted that an "any effect" test would effectively discriminate *against* religious interests: "A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments ... impart certain benefits to virtually all our activities, and religious activity is not an exception. ... [R]eligious institutions need not be quarantined from public benefits that are neutrally available to all .... The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. *If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.*" 426 U.S. at 745-47 (emphasis added). *See also* Justice Powell's recent opinion in *Widmar v. Vincent*, 454 U.S. 263, 70 L.Ed. 2d 440, 450-51 & n. 15 (1981).

> *one aspect of an institution frees it to spend its other resources on religious ends.*
>
> [413 U.S. at 742-43 (emphasis added).]

Rather than "any" effect, what the Court has consistently been concerned with is the *"primary"* effect of challenged legislation. Merely because a law "make[s] it more likely that some children choose to attend a sectarian school ... does not alone demonstrate an unconstitutional degree of support for a religious institution." *Board of Education v. Allen*, 392 U.S. 236, 244 (1968). Such an effect is not an unconstitutional effect. As Chief Justice Burger explained in *Tilton v. Richardson*, 403 U.S. 672 (1971):

> The *crucial question* is not whether some benefit accrues to a religious institution as a consequence of the legislative program, *but whether its principal or primary effect advances religion.*
>
> [403 U.S. at 679 (emphasis added.)][7]

D. The Traditional Indicia Of Primary Effect

Whether challenged legislation has a permissible primary secular effect or an impermissible primary religious effect is an

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[7]*See also Everson v. Board of Education*, 330 U.S. 1, 17-18 (1947). In *Walz v. Tax Commission*, 397 U.S. 664 (1970), Chief Justice Burger summarized the teaching of *Everson* and *Allen* as to "primary" effect when he wrote that "[i]n *Everson* the Court declined to construe the Religion Clauses with a lateralness that would undermine the ultimate constitutional objective as illuminated by history. Surely, bus transportation ... to pupils who receive religious instruction aid[s] that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age .... Similarly [in *Allen*], making textbooks available to pupils in parochial schools in common with public schools was surely an aid to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books .... *[But such aid] was not seen ... as having a primary effect of aid contravening the First Amendment.*" *Walz*, 397 U.S. at 671-72 (emphasis added).

admittedly difficult inquiry. Yet, the *Nyquist* decision itself illustrates the contours of this "crucial question." In scrutinizing the New York legislation challenged in *Nyquist*, Justice Powell examined the three factors which traditionally have been determinative of the "effect" question: first, whether the benefits of the program are disbursed to individuals rather than institutions; second, whether the benefits either have no inherent religious significance or are sufficiently "restricted" to ensure that their religious significance is merely incidental; and finally, whether the benefits are available to a broad class of beneficiaries, without regard to religious or nonreligious attributes. Although the New York programs at issue in *Nyquist* failed to qualify under these factors, the *Nyquist* decision highlights what is necessary: the "effect" standard is met if educational benefits are made available to a broad class of individuals (rather than institutions) and if any possible sectarian effect of the benefits is sufficiently indirect, incidental, and restricted.

E. Disbursement To Individuals Rather Than Institutions Favors A Finding Of Primary Secular Effect

Judging from the notable absence in petitioners' brief of any meaningful reference to the distinction between aid to individuals and aid to institutions, petitioners apparently believe and would have the Court hold that it is a distinction without a difference. Indeed, what is implicit in petitioners' silence on this point is made explicit by their amici:

> The dichotomy between pupil (or parent of pupil) benefit and benefit to the schools seems to be "a chimerical constitutional criterion."
>
> *[Amicus Brief of the Nat'l School Boards Ass'n* at 25, *quoting* Freund, *Public Aid to Parochial Schools*, 82 *Harv. L. Rev.* 1980 (1969).]

With all due respect to petitioners, amicus, and Professor Freund, such a comment betrays a fundamental misunderstanding of this Court's Establishment Clause decisions. Far from being "chimerical," the distinction between benefits to individuals and benefits to institutions is of overriding constitutional sig-

nificance; it reflects a basic distinction between what the "effect" test is concerned with and what it is not. That test is an "institutional" test. As Justice Powell explained in *Nyquist*, it is designed to scrutinize "effect[s] advantageous to religious *institutions*," not individuals. *Nyquist*, 413 U.S. at 783 n. 39 (emphasis added). *See also Wolman*, 433 U.S. at 263 (Powell, J.) (separate opinion). Time and again this Court has reaffirmed the teaching of *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968), that state aid to individuals stands on an entirely different constitutional footing from aid to institutions.[8] In *Lemon v. Kurtzman*, Chief Justice Burger aptly summarized this principle when he stated:

> The ... statute [at issue in *Lemon*] ... has the ... defect of providing state financial aid *directly* to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out *that state aid was provided to the student and his parents -- not to the church-related school.*
>
> [403 U.S. at 621 (emphasis added).]

This is not to say that disbursement to individuals necessarily satisfies the "effect" standard.[9] As Justice Powell explained in *Nyquist*, the fact that aid is disbursed to individuals rather than institutions does not create an irrebuttable presumption of

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[8]For example, in *Allen* Justice White wrote that *"no funds or books are furnished to parochial schools and the financial benefit is to parents and children, not to schools."* 392 U.S. at 243-44 (emphasis added). Similarly, in *Everson* Justice Black stated that the *"State contributes no money to the schools. It does not support them.* Its legislation ... does no more than provide a general program *to help parents* get their children, regardless of their religion, safely and expeditiously to and from ... schools." *Everson*, 330 U.S. at 17-18 (emphasis added).

[9]This is also not to say that aid directly to institutions necessarily violates the "effect" standard. *See, e.g., Committee for Public Education v. Regan*, 444 U.S. 646 (1980).

validity but is one significant factor to be considered. *Nyquist*, 413 U.S. at 781.[10] In light of cases such as *Everson* and *Allen*, it is a highly significant factor. Justice Powell himself pointed this out in his separate opinion in *Wolman*, when he noted that individualized "instructional materials," incapable of diversion to religious uses, can be provided by the State *"so long as the materials are lent to the individual students or their parents and not to the sectarian institutions."* *Wolman*, 433 U.S. at 263 (emphasis added). In making these comments, Justice Powell was explicitly distinguishing *Meek v. Pittenger*, 421 U.S. 349 (1975), where the Court held that similar loans of instructional materials directly to schools were impermissible.[11]

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[10]At least three Justices – Chief Justice Burger, Justice White (the author of *Allen*), and Justice Rehnquist – would seem to rule that disbursement to individuals rather than institutions renders a program per se constitutional. According to the Chief Justice: "[T]he Establishment Clause does not forbid ... a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction or worship ... [A]id to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Nyquist*, 413 U.S. at 799-801 (Burger, C.J., dissenting). Similarly, Justice Rehnquist has stated that "the impact, if any, on religious education ... is significantly diminished by the fact that the benefits go to the parents rather than to the institutions." *Nyquist*, 413 U.S. at 812-13 (Rehnquist, J., dissenting).

[11]Justice Powell's separate opinion in *Wolman* also points out a second significant aspect of the "child benefit" doctrine of *Allen* and *Everson* – where aid is disbursed to children rather than schools, there is no concern with whether the schools are "pervasively sectarian." In *Meek* the Court employed this concept of "pervasive sectarianism" to invalidate loans made *directly* to church-related schools, on the ground that "[s]ubstantial aid to the educational function of ...[pervasively sectarian] schools ... necessarily results in aid to the ... religious mission" as well, since the secular and religious functions are "inextricably intertwined." *Meek*, 421 U.S. at 366. As Justice Powell's *Wolman* opinion makes clear, loans to students, not schools, are permissible under *Allen, even though the schools attended by the students are "pervasively sectarian."*

The challenged Minnesota education expense tax deduction statute unquestionably confers its benefits upon individuals rather than institutions. As *Allen*, *Everson*, and Justice Powell's opinion in *Wolman* make clear, such a fact favors a finding of "primary secular effect" and constitutionality.

F. A "Genuine Tax Deduction" Portrays Government Abstention Rather Than Active Involvement And Thus Reflects A Sufficient Guarantee Of Separation Between The State And Religious Interests

1. The "Guarantee Of Separation" Requirement

To the extent that disbursement to individuals (rather than institutions) does not conclusively establish a permissible primary secular effect, the Court's application of the "effect" standard has also looked to whether the relevant benefit, either by its very nature or through the manner of its provision, contains a sufficient "guarantee ... [of] separation between secular and religious educational functions ... to ensure that State financial aid supports only the former." *Nyquist*, 413 U.S. at 783, *quoting Lemon*, 403 U.S. at 613. As Justice Powell explained in *Nyquist*, the programs in *Everson* (school transportation) and *Allen* (textbook loans) were found to have a primary secular effect not only because the aid went to children or their parents rather than schools, but also because the aid either had "no inherent religious significance" or was sufficiently restricted so that its potential sectarian impact was minimized. *Nyquist*, 413 U.S. at 782. As such, the programs in *Everson* and *Allen* embodied the necessary "guarantee of separation" and thus could "fairly be viewed as reflections of a neutral posture toward religious institutions." *Nyquist*, 413 U.S. at 782.

2. Absolute Separation Has Never Been Required

Consistent with the principle that "primary" effect, not "any" effect, is the proper test, the Court has never required that this "guarantee of separation" be an absolute guarantee; it has never scrutinized educational aid legislation for total separation between secular and sectarian effects. "[A] hermetic separation of the two is an impossibility ... [that] has never [been] required." *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976) (Blackmun, J., joined by Burger, C.J., and

Powell, J.).[12] As Chief Justice Burger recognized in *Lemon v. Kurtzman*:

> Our prior holdings do not call for total separation between church and state; *total separation is not possible in an absolute sense* ... [T]he line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.
>
> [403 U.S. at 614 (emphasis added).]

The contrasts between *Everson*, *Allen*, and *Nyquist* are instructive on what constitutes a sufficient, although perhaps not an absolute, "guarantee of separation." In *Everson* the Court characterized the challenged school transportation bus fare program as comparable to such general welfare benefits as police and fire protection, and held that even though "[i]t is undoubtedly true that children are helped to get to church schools," such benefits nevertheless are "separate and ... indisputably marked off from the religious function" of church-related schools and thus ensure neutrality. *Everson*, 330 U.S. at 17-18. As Justice White put it in *Allen*, the *Everson* bus rides had "no inherent religious significance." *Allen*, 392 U.S. at 244.

Unlike the bus rides in *Everson*, the textbook loans in *Allen* could not be construed as lacking "inherent religious significance." Textbooks have content, and that content could conceivably be sectarian. Nevertheless, the loan program was approved because the possible religious significance of the textbooks was offset by restrictions in the program itself – only secular textbooks could be loaned. *Allen*, 392 U.S. at 244-45.

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[12]Compare Justice Powell's separate opinion in *Wolman*, 433 U.S. at 263 (emphasis added): "Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause *without resort to blind absolutism.*" *See also Committee for Public Education v. Regan*, 444 U.S. 646, 662 (1980): "Our decisions have tended to avoid categorical imperative and absolutist approaches at either end of the range of possible outcomes."

The tuition tax reductions challenged in *Nyquist*, although provided to parents rather than schools, stand in marked contrast to the programs approved in *Everson* and *Allen*. Unlike *Everson's* bus rides and *Allen's* textbook loans, the *Nyquist* program embodied no guarantee that its potential sectarian effect would be minimal or incidental. Just the opposite, New York's tuition tax reductions were an entirely *"arbitrary amount"* designed to "yield a *predetermined* amount of tax forgiveness." *Nyquist*, 413 U.S. at 789 (emphasis added). *See* note 3 *supra*. They bore no relation whatsoever "to the amount of money actually expended by any parent on tuition." 413 U.S. at 790. Far from containing a guarantee of separation, the *Nyquist* tax reductions were capable of resulting in a net, predetermined, and *guaranteed* monetary benefit that could equal or *even exceed* the amount spent on tuition. In light of these characteristics, Justice Powell had little difficulty in finding that New York's tax reductions were not part of a bona fide tax program but were mere subsidies crafted to serve as "encouragement and reward" and an "incentive to parents to send their children to sectarian schools." 413 U.S. at 786, 791. Such an "incentive" is a far cry from the necessary "guarantee of separation."

3. Nyquist, Walz, And Genuine Tax Deductions: Abstention Versus Involvement

In reaching the foregoing conclusion, Justice Powell was careful to point out that New York's arbitrary tax reductions were not "genuine tax deductions" and that the Court's decision should not be construed as implicating the latter. He wrote:

> Since the [tax reduction] program here does not have the elements of a *genuine tax deduction*, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable under the "neutrality" test in *Walz* [*v. Tax Commission*, 397 U.S. 664 (1970).]
>
> [*Nyquist*, 413 U.S. at 790 n. 49 (emphasis added).]

There was good reason to distinguish genuine tax deductions. According to the factors specified in *Walz*, a genuine tax deduction contains the requisite "guarantee of separation" and thus

comes within the realm of permissible effects defined by cases such as *Everson* and *Allen*.

In *Walz* Chief Justice Burger contrasted direct government subsidies of religious activity with exemption from taxation of the same activity, and held that whereas the former can pose serious Establishment Clause concerns, the latter reflects only government abstention and thus stands on an entirely different constitutional footing. Such abstention is fully consistent with the separation requirement. As Justice Frankfurter explained, "[s]eparation is a requirement *to abstain* from fusing functions of Government and of religious sects." *McCollum v. Board of Education*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) (emphasis added). Similarly, in *Walz* Chief Justice Burger reasoned that without affirmative government action towards religious interests, there is nothing to trigger the traditional Establishment Clause concerns of "sponsorship, financial support and *active* involvement of the sovereign in religious activity." 397 U.S. at 668 (emphasis added). According to the Chief Justice:

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them .... Obviously *a direct money subsidy would be a relationship pregnant with involvement*, ... but that is not this case .... *The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches* but simply *abstains* from demanding that the church support the state .... *There is no genuine nexus between tax exemption and establishment of religion.*
>
> [*Walz*, 397 U.S. at 674-75 (emphasis added).]

As Justice Powell intimated in *Nyquist* footnote 49, the analysis in *Walz* serves to distinguish genuine tax exemptions and deductions, on the one hand, from New York's hybrid tax reductions, on the other. As pointed out earlier, New York's arbitrary tax reductions were not part of a bona fide tax program but were mere incentives and rewards, a form of subsidization.

They reflected active government involvement with religious interests and thus fell on the impermissible side of the subsidy/abstention distinction drawn by Chief Justice Burger in *Walz*. By contrast, genuine tax exemptions and deductions fall on the valid side of that distinction; both are a form of government abstention from taxation rather than affirmative government involvement with religious interests.[13] Although, as the Chief Justice pointed out in *Walz*, there is no clear-cut point at which a tax program crosses over from permissible primary secular effects to impermissible primary sectarian ones,[14] the fact of government abstention rather than active involvement ensures that the religious effects will be attenuated, indirect, and only incidental. As *Walz* holds, such incidental benefits reflect a sufficient guarantee of separation and hence are valid under the Establishment Clause.

The foregoing discussion highlights the significant differences between New York's hybrid tax reductions and Minnesota's genuine tax deductions. Whereas the former were effectively nothing more than subsidies, Minnesota's education expense deductions involve government abstention and are part of a true tax program, designed not to encourage religious activity, nor to result in any predetermined and guaranteed financial reward, but merely to further quality education for all children without regard to religion. According to *Walz*, any sectarian benefits derived from the Minnesota program will be only incidental benefits. In such a case, the necessary "guarantee of separation" exists and the program portrays a primary secular effect, a conclusion which is irrebuttably bolstered by the last factor indicative of primary effect.

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[13]The fact that *Walz* dealt with tax "exemptions" whereas the instant case involves tax "deductions" is not constitutionally significant. In *Nyquist*, Justice Powell noted that "constitutionality ... does not turn in any event on the label ...." 413 U.S. at 789. The important point is the "substance" of the program, and here that "substance" is government abstention from taxation and a genuine tax program.

[14]In *Walz* Chief Justice Burger stated that "[t]he test is inescapably one of degree .... Separation in this context cannot mean absence of all contact." 397 U.S. at 674, 676.

G. Availability Of Benefits To A Broad Class Of Persons Ensures There Will Be No Symbolic Identification Between Government And Religious Interests

> *[T]he ... benefit is available to a broad class of nonreligious as well as religious ... groups .... The provision of benefits to so broad a spectrum of groups is an important index of secular effect.*
>
> [Justice Powell in *Widmar v. Vincent*, 454 U.S. 263, 70 L.Ed. 2d 440, 450 (1981) (emphasis added).]

Walz rests not only on the fact of government abstention from taxation but also, and perhaps more fundamentally, on the fact that the tax exemptions at issue were available to a broad class of beneficiaries, to "*all* houses of religious worship within *a broad class* of property owned by nonprofit, quasi-public corporations ...." *Walz*, 397 U.S. at 673 (emphasis added). *Everson* and *Allen* are to the same effect; in each case the educational benefits were available not merely to nonpublic school children but to *all* school children, regardless of whether they attended a public or a nonpublic school. By contrast, the New York legislation challenged in *Nyquist* was narrowly drawn, affording benefits *only* to nonpublic school children and their parents. Justice Powell stressed this very fact when he distinguished *Nyquist* from *Everson* and *Allen*. As Justice Powell explained:

> *Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools.
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> [*Nyquist*, 413 U.S. at 783 n. 38 (emphasis in original).] [15]

The Minnesota legislation before the Court unquestionably reaches a broad class of beneficiaries. Indeed, *it could not be*

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[15] *See L. Tribe, American Constitutional Law* 845 (1978) (emphasis added): "The *narrowness* of the benefited class was *a key factor* in ... *Nyquist*."

any broader–education expense tax deductions are made available to *all* parents who incur the specified costs, regardless of whether their children attend public, nonpublic and nonsectarian, or church-related schools. According to cases such as *Walz*, *Allen*, and *Everson*, and according to Justice Powell's statements in *Nyquist* and *Widmar*, this breadth militates strongly in favor of the constitutionality of the Minnesota statute.

The statute's obvious breadth has not dissuaded petitioners. In the trial court and again in the Court of Appeals, and yet again in this Court, they have sought to undercut the importance of the statute's breadth by pointing to cleverly devised statistical calculations which supposedly show that Minnesota's tax deductions are taken primarily by parents whose children attend church-related schools. Petitioners' reliance on such statistical data is misplaced for at least two reasons. First, their "statistical argument" is inherently misleading; as trial Judge Renner found, it "lacks credibility by reason of *omissions of serious significance.*" *Mueller v. Allen*, 514 F. Supp. 998, 1003 (D. Minn. 1981) (emphasis added). Second, and even more noteworthy, petitioners' "statistical argument" has missed the point; they have ignored a fundamental distinction, consistently followed by this Court, between narrowly drawn legislation, on the one hand, and broadly drawn legislation, on the other.

The Court has engaged in a statistical examination of the breadth of the benefited class *only* when it has been confronted with *narrowly* drawn legislation under which benefits were limited to nonpublic schools or their students.[16] In cases involving

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[16] In *Nyquist*, for example, Justice Powell examined the relative percentages of sectarian and nonsectarian schools within the legislation's class of beneficiaries, and concluded that the "great majority" of the beneficiaries were either sectarian schools or children attending such schools. 413 U.S. at 768, 783, 794. Petitioners' statistical argument apparently derives from *Nyquist*. Even in *Nyquist*, however, the Court did not employ the type of analysis urged by petitioners. In *Nyquist*, Justice Powell looked to the "intended beneficiaries" of the statute, to who was "entitled to" or eligible for benefits. 413 U.S. at 768. Petitioners, by contrast, would go beyond *Nyquist* and measure breadth in terms of actual recipients.

broadly drawn statutes, such as *Allen*, *Walz*, and *Everson*, the Court has *not* engaged in a statistical breadth analysis but instead has stressed that the legislation, as written, reached all similarly situated persons without regard to their religious or nonreligious attributes.[17] In *Allen*, for example, Justice White wrote that "[t]he law merely makes available to *all* children the

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[17] *Nyquist* itself recognized this distinction. In pointing out that the great majority of the beneficiaries of New York's narrowly drawn tax reduction program were parents with children in church-related schools, Justice Powell was careful to distinguish *Walz*, *Everson*, and *Allen*, and to state: "The exemption challenged in *Walz* was *not restricted* to a class composed exclusively or even predominantly of religious institutions. Instead, the exemption covered *all* property devoted to religious, educational, or charitable purposes. As the parties here must concede, tax reductions ... flow primarily to the parents of children attending sectarian ... schools. Without intimating whether this factor alone might have controlling significance *in another context* ..., it should be apparent that ... *the narrowness of the benefited class would be an important factor.*" 413 U.S. at 794 (emphasis added). Justice Powell cross-referenced this statement to his earlier footnote 38, in which he stated that *Nyquist* differed from *Allen* and *Everson* in that "*all* schoolchildren" were eligible for benefits in the latter cases, and that "public assistance ... made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited" was not implicated by the *Nyquist* decision. 413 U.S. at 783 n. 38 (emphasis in original). In this regard Justice Powell cited *Wolman v. Essex*, 342 F. Supp. 399, 412-13 (S.D. Ohio), *aff'd.*, 409 U.S. 808 (1972), where the court explained that *Everson*, *Allen*, *Walz*, and *Tilton* approved programs under which "religiously affiliated institutions were among a broad class of beneficiaries deriving benefits of a general, broad-based public policy." *See also Kosydar v. Wolman*, 353 F. Supp. 744, 753 (S.D. Ohio 1972), *aff'd. mem. sub nom. Grit v. Wolman*, 413 U.S. 901 (1973) ("[w]here the affected class of a legislative enactment is a broad and internally pluralistic one, then, as a matter of law, the primary effect of such a statute is not the advancement of religion ..."). *Nyquist* thus drew a clear distinction between statutes which benefit only a narrow class of persons, and which thus should be subject to a statistical scrutiny, and statutes which reach all similarly situated persons, and which traditionally have not been analyzed in terms of a statistical breakdown of beneficiaries.

benefits of a general program ...." 392 U.S. at 243 (emphasis added).

This distinction is not one without a difference. As Professor Tribe has explained, the breadth component and the effect standard as a whole are concerned not so much with actual effects as with public perceptions and "symbolic identification" of government programs with religious interests. *L. Tribe, American Constitutional Law* 839-46 (1978). In the recent decision in *Larkin v. Grendel's Den., Inc.*, ____ U.S. ____, 51 U.S.L.W. 4025, 4028 (1982) (emphasis added), for example, the Court stressed the *"symbolic benefit to religion in the minds of some."* According to Tribe:

> [W]hat turns on the breadth of the benefited class is not dollars -- the amount of aid plainly does not depend on how many others also receive it – *but symbols; the broader the class benefited, the less likely it is that the program will be perceived as aid to religion.*
>
> *[Tribe, supra,* at 845 (emphasis added).]

Narrowly drawn legislation clearly embodies a danger of symbolic identification, since it is far more likely that such a program will be seen as conferring a special benefit on religious interests. The fact that some persons receive a benefit, whereas other similarly situated persons are excluded, tends naturally to foster a perception by those excluded of a special affiliation between the State and the benefited class. For example, if eligibility for education benefits is limited to students at nonpublic schools, as in *Nyquist*, the public's common knowledge that most such schools are sectarian, coupled with the fact that most of the children in the total student population, those in public schools, are statutorily excluded from eligibility, likely will lead to a perception that the benefits flow primarily to sectarian schoolchildren. In such a case it is clearly appropriate to look behind the statute and, through a statistical breadth analysis, ascertain whether the danger of symbolic identification is a real and probable danger.

Broadly drawn legislation presents an entirely different situation. Where all similarly situated persons (such as all parents or

all schoolchildren) are eligible for benefits, as in *Everson*, *Allen*, and *Walz*, there is little likelihood that the program will be perceived as aid to a special group, since there is no special group which receives an eligibility preference. In such a case there is little or no danger of symbolic identification and consequently nothing to trigger the need for a statistical examination of the class of beneficiaries.[18] The important point is that the statute treats all persons equally, such that no one group can be seen as being favored over others.

The concept of symbolic identification ties together and makes sense of the seemingly different modes of breadth analysis used in *Nyquist*, on the one hand, and *Walz*, *Everson*, and *Allen*, on the other. It leads to the constitutionally significant distinction between narrowly drawn versus broadly drawn legislation. The Minnesota statute before the Court falls on the latter side of that distinction. Because its benefits are available to parents of all school children, not merely parents of nonpublic

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[18] The inherent dangers of grounding constitutional adjudication on so slender a reed as statistical analysis suggests that such an analysis should be avoided if at all possible. Statistics are notoriously pliable. Data can be manipulated to appear to support any conceivable position. Undue reliance on statistical calculations will hardly lead to consistent results. If primary effect is made to turn on mere statistics, a statute that is valid one year could well become invalid the next; the same programs upheld in *Walz*, *Allen*, and *Everson* could now be attacked anew and stricken solely because of a numerical change in the breakdown of beneficiaries. It is difficult to believe that constitutional law can thus be reduced to mere mathematics. As the Eighth Circuit aptly stated: "If a pure de facto approach were taken, a statute's constitutionality might turn on local annual statistics. That is, *the same statute might be constitutional one year, and not the next, or in one state and not in another, depending upon the current statistical breakdown of sectarian and nonsectarian schools*." *Mueller v. Allen*, 676 F.2d 1195, 1201 n. 13 (8th Cir. 1982) (emphasis added). *See also Walz*, 397 U.S. at 674. Given these potential pitfalls, the courts should naturally be hesitant to place great reliance on mere statistical calculus, and should not resort to such a method where, as with broadly drawn legislation, it is not necessary.

school children, the Minnesota statute does not present the danger of symbolic identification found in cases such as *Nyquist*. Just the opposite, it is like the statutes in *Allen*, *Walz*, and *Everson*, where the absence of such danger strongly favored a finding of constitutionality.

III. THE MINNESOTA EDUCATION EXPENSE TAX DEDUCTION STATUTE SATISFIES EACH OF THE FACTORS SET FORTH IN NYQUIST WHICH TRADITIONALLY HAVE BEEN INDICATIVE OF A PERMISSIBLE PRIMARY SECULAR EFFECT

Far from being an absolute condemnation of all tax legislation aimed at improving quality education, the *Nyquist* decision is a virtual primer on how such a statute must be drawn to ensure that it has a permissible primary secular effect. In *Nyquist* Justice Powell stressed three factors: aid to individuals rather than institutions, an assurance of separation, and benefits made available to a broad class of beneficiaries. The Minnesota education expense tax deduction statute reflects each of these factors: its benefits go to children and their parents, not schools; it is a genuine tax deduction involving government abstention rather than active government involvement with religious interests, and thus ensures separation and neutrality; its benefits are available to a broad class of parents who incur costs in connection with the education of their children, regardless of the schools they happen to attend. According to *Nyquist* itself, this type of tax legislation cannot be stricken on effect grounds.

CONCLUSION

When all the legal arguments and constitutional complexities are momentarily set aside, then this case is not about religion or nonreligion, nor about establishment or neutrality. What it's about is children, and the quality of education they're going to receive. As far as the children are concerned, whether that education comes from a public, a private, or a church-related school makes no difference at all. What matters is that it is a quality education.

The statute before the Court is one attempt to deal with the ever-growing crisis in education. It reflects a legislative desire to

help children achieve their true and full potential; it is an endeavor to ensure that the children in our schools today will grow to be educated, informed, and responsible adults. Perhaps there is no constitutional "right" to an education, but that hardly means that education of youth is not highly important. It clearly is. As this Court wrote in *Board of Education v. Allen*, 392 U.S. at 247, "Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." For these reasons, the judgment of the Eighth Circuit should be affirmed.

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State of Ohio :
: SS:
County of Franklin :

On this 26 day of January 1983, before me, a Notary Public in and for the State of Ohio, County of Franklin, the undersigned, Steven W. Tigges, personally appeared before me and, being first duly sworn, did depose and say that in accordance with Rule 28.3 of the Rules of Practice of the Supreme Court of the United States, he served today, by first class United States mail, postage prepaid, three copies of the motion for Leave to File a Brief Amicus Curiae and the Brief Amicus Curiae of Citizens for Educational Freedom, in Support of the Respondents, upon the following attorneys of record:

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Janel Burke, Notary Public

JANEL BURKE
NOTARY PUBLIC - STATE OF OHIO
MY COMMISSION EXPIRES AUGUST 12, 1984

MOTION FILED
FEB 3 1983

No. 82-195

In the

Supreme Court of the United States

October Term, 1982

Van D. Mueller and June E. Noyes, *Petitioners*

Clyde E. Allen, Jr., Dennis J. Berthiaume, Karen F. Berthiaume, Thomas W. Dzik, Mary J. Dzik, Edward F. Fujan, Joleen A. Fujan, Brenda B. Becker, Richard C. Hollingsworth, Marjorie Hollingsworth, Roger Dehaan and Dorothy Dehaan, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Council for American Private Education, the American Association of Christian Schools International, the Association for Public Justice, the Christian Educators' Association, Christian Schools International, Citizen's for Fairness in Education, the Free Congress Research and Education Foundation, the National Association for the Legal Support of Alternative Schools, the National Coalition of Alternative Community Schools, and Parents Acting for Choice in Education in Support of the Respondents

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Wolman v. Walter, 433 U.S. 229 (1977) 7,10,16

Other Authorities: Page(s)

C. Antieau, A. Downey, E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964) 22,26-27

S. Arons, "The Separation of School and State: *Pierce* Reconsidered," 46 *Harv. Ed. Rev.* 76 (1976) 7

S. Arons, *Compelling Belief* (1982) 7

W. Berns, *The First Amendment and the Future of American Democracy*, (1976) 22,27

B. Bittker, "Churches, Taxes and the Constitution," 78 *Yale L. J.* 1285 (1969) 13-14

B. Bittker and G. Rahdert, "The Exemption of Nonprofit Organizations from Federal Income Taxation," 85 *Yale L. J.* 299 (1976) 14-15

W. Blakely, Ed., *American State Papers Bearing on Sunday Legislation* (1911) 27

R. Butts, *The American Tradition in Religion and Education* (1950) 22

J. Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict", 41 *U. Pitt. L. Rev.* 673 (1980) 11,17

J. Cogley, Ed., *Religion in America: Original Essays on Religion in a Free Society* (1968) 22

R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982) 22,24,27

E. Corwin, "The Supreme Court as a National School Board," 41 *Law & Contemp. Probs.* 3 (1949) 22

R. Dixon, "Religion, Schools and the Open Society," 13 *J. Pub. L.* 267 (1964) 22

J. Elliot, Ed., III *Debates on the Federal Constitution* (1836) 26

P. Freund, "Public Aid to Parochial Schools," 82 *Harv. L. Rev.* 1680 (1969) 17

E. Gaffney, "Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy," 24 *St. Louis U.L.J.* 205 (1980) 17

E. Gaffney, Ed., *Private Schools and the Public Good* (1981) 4-6

M. Howe, *The Garden and the Wilderness* (1965) 22

G. Hunt, Ed., IX *Writings of James Madison* (1909) 25,27

D. Kelley, *Why Churches Should Not Pay Taxes* (1977) 12-13,20

D. Kommers and M. Wahoske, Eds., *Education and Freedom: Pierce v. Society of Sisters Reexamined* (1978) 7

L. Levy, *Judgments: Essays on American Constitutional History* (1972) 22,25

M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978) 22,23-24

R. McCarthy, J. Skillen, and W. Harper, *Disestablishment A Second Time: Genuine Pluralism for American Schools* (1982) 7

C. Miller, *The Supreme Court and the Uses of History* (1969) 23

E. Norman, *The Conscience of State in North America* (1964) 22

J. O'Neill, *Religion and Education Under the Constitution* (1949) 22

C. Rice, *The Supreme Court and Public Prayer* (1964) 22

K. Ripple, "The Entanglement Test of the Religion Clauses — A Ten Year Assessment," 27 *U.C.L.A. L. Rev.* 1195 (1980) 11

J. Serritella, "Tangling With Entanglement: Toward a Constitutional Evaluation of Church-State Contacts," 44 L. *and Contemp. Problems* 143 (1981) 11

J. Story, III *Commentaries on the Constitution of the United States* (1833) 27-28

A. Sutherland, "Historians, Lawyers and 'Establishment of Religion'," in D. Gianella, Ed., V *Religion and the Public Order* 27 (1969) 22

L. Tribe, *American Constitutional Law* (1978) 8,17,28

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Council for American Private Education (CAPE) is a Washington D.C.-based coalition organization serving elementary and secondary private education. Fifteen national private school organizations comprise the membership of CAPE: the American Lutheran Church; the American Montessori Society; the Association of Evangelical Lutheran Churches; the Association of Military Colleges and Schools of the United States; Christian Schools International; Friends' Council on Education; the Lutheran Church, Missouri Synod; the National Association of Episcopal Schools; the National Association of Independent Schools; the National Association of Private Schools for Exceptional Children; the National Catholic Education Association; the National Society for Hebrew Day Schools; Seventh Day Adventist Board of Education, K-12; Solomon Schechter Day School Association; and the United States Catholic Conference. Together these organizations operate about 15,000 private schools enrolling approximately 4.2 million students, or over 80% of the nation's private school students. Member organizations are non-profit and subscribe to a policy of non-discrimination in admissions with regard to race, color, and national origin. This brief does not purport to reflect the views of all members of the coalition, but is based upon policies adopted by the Board of Directors of the Council.

The American Association of Christian Schools (AACS) is an Illinois-based, non-profit organization serving approximately 1,100 fundamentalist Christian schools throughout the United States and Canada, with affiliated state organizations in forty states. Nearly all of the member schools are an integral component of autonomous, local Christian churches.

The Association of Christian Schools International (ACSI) is a California-based, non-profit organization, serving approximately 1,900 schools and colleges throughout the United States and Canada. All of the member schools include religious instruction among other subjects normally presented in their curriculum.

The Association for Public Justice (APJ) is a Washington, D.C.-based, non-profit, voluntary association of Christian citizens attempting to address issues of structural justice in many areas of public policy, including the educational arena.

The Christian Educators' Association (CEA) is a non-profit, tax-exempt, California corporation which is a voluntary membership organization of public school teachers and administrators, with over 23,000 members and affiliates. CEA is dedicated to insuring quality education for all students in elementary and secondary education. CEA is concerned with the equitable distribution of the costs of public education and in promoting parental interests in the educational process.

Christian Schools International (CSI) is a Michigan-based, non-profit, voluntary association of approximately 400 Christian schools in the United States and Canada. These schools are generally Calvinistic in their educational philosophy.

Citizens for Fairness in Education (CFE) is a Texas-based, non-profit, voluntary association advocating tax benefits for those who relieve the public school system by sending their children to nonpublic schools.

The Free Congress Research and Education Foundation is a Washington, D.C.-based, non-profit research organization. The Family Policy Division of the Foundation examines public policy matters affecting the integrity and stability of the family, as well as other issues relating to traditional family values.

The National Association for the Legal Support of Alternative Schools (NALSAS) is a national information and legal

service center located in New Mexico. NALSAS is designed to research, coordinate and support legal actions involving non-public educational alternatives. NALSAS helps interested persons and organizations locate, evaluate, and/or create viable alternatives to traditional schooling approaches.

The National Coalition of Alternative Community Schools (NCACS) is a non-profit organization of people engaged in the challenge of securing the benefits of an egalitarian society for all people, regardless of race, religion, sex or age. The members of NCACS believe in utilizing educational processes to develop the full human potential of every individual. NCACS members are from diverse backgrounds and approach the task of creating an economically democratic society through many different means. For example, NCACS assists families who are involved in educating their children at home, and supports the creation of alternative schools that exemplify the concepts of democratic process and self government.

Parents Acting for Choice in Education (PACE) is a New York-based, non-profit organization of people desiring to help parents understand and fulfill their responsibilities toward the education of their children, to promote increased public awareness about the proper role of government in education, and to strive to assure freedom of choice in education for all who desire it.

Amici are religious bodies and voluntary associations of parents and taxpayers. The religious bodies have since colonial times enjoyed the benefit of exemption from the payment of various taxes. This self restraint on the part of the government to exercise its power to tax religious bodies has been upheld by this Court under the Establishment Clause in *Walz v. Tax Commission of the City of New York,* 397 U.S. 664 (1970). The concomitant benefit to taxpayers of deductibility of charitable contributions is clearly at issue in the instant litigation.

Other amici are primarily concerned with parental rights in educational matters. These rights are acknowledged as part of the patrimony of humankind in the Universal Declaration of Human Rights adopted in 1948 by the United Nations General Assembly. Over two decades before the adoption of this declaration, this Court unanimously invalidated a provision of the Oregon State constitution that would have eliminated parental choice in the education of their children. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The legislation challenged in the instant litigation provides a general tax benefit for parents incurring educational expenses whether incurred in public or nonpublic schools. The freedom of parents to choose the form of education they deem appropriate for their children is among the legitimate purposes of this legislation.

Both groups of amici have vital interests in the outcome of this litigation and cannot reasonably expect their views to be presented fully to this Court by the parties. For the foregoing reasons, amici respectfully move this Court for leave to file this brief to urge this Court to reassert its teaching in *Walz* concerning the constitutional permissibility of broad, generally available tax benefits that enable taxpayers to make choices consistent with the general welfare, and its teaching adumbrated in *Pierce* and developed in subsequent decisions concerning familial privacy that parents retain an important interest in exercising educational choice.

BRIEF AMICUS CURIAE

INTEREST OF AMICI

The interests of the amici in the instant litigation are set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

I. The inclusion of taxpayers incurring certain educational expenses at church-related schools within a general program of genuine tax deductions broadly available to all who incur such expenses is permissible under the Establishment Clause:

(a) The statute has the *valid secular purpose* of promoting pluralism and diversity among public and nonpublic schools;

(b) The statute law does not require *excessive entanglement* between the government and religious bodies; and

(c) The statute does not have the *direct and immediate effect* of advancing religion.

II. The historic purpose of the Religion Clauses of the First Amendment was not to prohibit generally available tax benefits indirectly benefiting all religious bodies on a neutral basis, but was to prohibit the government from imposing any particular denominational or sectarian belief or practice involuntarily on the people.

ARGUMENT

I. THE INCLUSION OF TAXPAYERS INCURRING CERTAIN EDUCATIONAL EXPENSES AT CHURCH-RELATED SCHOOLS WITHIN A PROGRAM OF GENUINE TAX DEDUCTIONS BROADLY AVAILABLE TO ALL WHO INCUR SUCH EXPENSES IS PERMISSIBLE UNDER THE ESTABLISHMENT CLAUSE.

A. Valid Secular Purpose

In his opinion for this Court in *Committee for Public Education and Religious Liberty v. Regan,* 446 U.S. 646 (1980), Justice White wrote:

> Establishment Clause cases are not easy, they stir deep feelings, and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. *id.* at 662.

Although Establishment Clause cases are not easy, this Court has never adopted the view that this Clause supports an attitude of hostility towards religious institutions that might derive some indirect benefit from a genuine tax deduction provision generally available to all citizens of a state, such as the legislation challenged in this litigation.

The basic purpose of the Establishment Clause is, of course, "to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Commission of City of New York,* 397 U.S. 664, 669 (1970). As Chief Justice

Burger stated in *Walz*, short of expressly proscribed governmental acts that would either establish religion or interfere with religion, "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *id.*

In this case there is no direct governmental subsidy of any particular religious group or of religious groups in general. To the contrary, the State of Minnesota made a reasonable and reasoned decision nearly three decades ago to recognize the validity of a healthy pluralism and diversity in education, and to refrain from collecting additional revenue from taxpayers who incur certain educational expenses arising at any eligible school, whether public or nonpublic.

Several of the amici supporting the Petitioners urge this Court to invalidate the challenged legislation on the ground that any benefit, however remote and indirect, derived from the statute by nonpublic schools is an assault on the fiscal stability of Minnesota's public schools. *See, e.g.* Brief Amicus Curiae of National School Boards Association (NSBA) and Brief Amicus Curiae of Minnesota Association of School Administrators et al. It should not, however, be imagined that the members of the Minnesota Legislature, many of whom are or have been public school teachers or administrators, remotely contemplated the undermining of that state's excellent public school system by the enactment of the challenged legislation, which benefits parents of children attending public as well as nonpublic schools. Nor should it be thought that the Establishment Clause can or should be used as a bludgeon to strike down any and all forms of support, however indirect, for nonpublic education. The Religion Clauses were adopted long before states had public school systems and cannot fairly be viewed as protecting an absolute monopoly of governmental resources for the schools that the government maintains and operates.

It is, moreover, regretable that the twin values of governmental neutrality in religious matters and parental freedom in the education of their children should be viewed as competing or in conflict with one another. At a recent conference in Washington, D.C., John J. Gilligan, a prominent public policy maker who has served in the legislative and executive branches of government at the local, state, and federal levels, expressed concern over the fruitless character of pitting these values against one another. Referring to his experience as Govenor of Ohio, Gilligan noted:

> My own experiences as Governor of Ohio in the early Seventies, in a state which had its fair share of all of the problems afflicting education today, convinced me that there were two major impediments to dealing successfully with our educational problems. First, there was the propensity of those in government to think in terms of an educational institution which had passed into oblivion 15 or 20 years earlier. In other words, they tended to think in terms that no longer applied to the current situation, and to deal with the problems of an earlier period rather than those of the present or the future.
>
> Second, and even more threatening to any hope of finding a solution to the problems of the Eighties and Nineties in the field of education, was the evident instict of educators and educational administrators — perhaps understandable in the light of what appeared to be dwindling moral and financial support for education — to divide the educational universe into separate and rival domains and duchies: public schools against private; academic programs versus vocational training; suburbs against central cities; underprivileged children versus the affluent; minorities against majority. That

tendency seemed to me then, and seems to me now, to accomplish nothing in terms of advancing the interests of one sector of education in relation to other, but rather to provide ammunition to those who were seeking any and every rationale for curtailing support to education as a whole. Participants in this kind of fratricidal strife were — and are — thus inflicting serious damage on the very enterprise they profess to defend and serve. "Foreword" in E. Gaffney, ed., *Private Schools and the Public Good: Policy Alternatives for the Eighties* viii (1981).

Another participant at this conference echoed this theme. Denis P. Doyle wrote:

> The conventional wisdom in much of the public and private sector holds that a major change in the way we finance education — adding private schools to the public expense ledger — is essentially a zero sum game. I would argue that, at least on the basis of comparative research, that is clearly not the case. The zero sum fear is based on a false assumption that the education pie is finite, and that even a small slice for private education will diminish public education . . . . the old conditions of support for public education are today on very shaky ground. But rather than viewing private education with suspicion and hostility, supporters of the public school system might gain, both financially and politically, by looking to the private sector for allies in the effort to adopt a strategy of support for education as a whole. The crucial question, of course, is whether or not the gains that private schools would enjoy would be offset by losses in the

> public sector. While we cannot answer the question definitely, the strongest evidence comes from Australia, where one third of the students are enrolled in private schools supported by public funds. Every indication suggests that there is now a much more broadly-based coalition of support for education in general and that the levels of support for education in the public sector alone are higher now than they would have been absent general support for education generally, both public and private. *Id.* at 78.

It is this kind of pluralistic, educational philosophy that undergirds the statute challenged by the instant litigation. In the historic decision of *Brown v. Bd. of Education* 347 U.S. 483 (1954) this Court acknowledged the vital role that education of the citizenry plays in a democratic society, calling education "perhaps the most important function of state and local governments . . . the very fundation of good citizenship . . . [and] a principal instrument in awakening the child to cultural values." *Id.* at 493. A similarly unanimous Court recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) that in a free and open society the government may not monopolize the transmission of meaning and value. As Justice McReynolds stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations. *id.* at 535.

Justice Douglas, moreover, observed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> While the evolution of the public school system in this country marked an escape from denominational control and was therefore admirable as seen through the eyes of those who think like Madison and Jefferson, it has disadvantages. The main one is that a state system may attempt to mold all students alike according to the views of the dominant group and to discourage the emergence of individual idiosyncrasies. *Id.* at 630 (Douglas, J. concurring).

To counteract this danger of totalitarian transmission of culture, this Court has recognized "the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools" *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973). In *Wolman v. Walter*, 433 U.S. 229 (1977), Justice Blackmun wrote that "the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education" *id.* at 240; Justice Powell observed that "the State has a legitimate interest in facilitating education of the highest quality for *all children* within its boundaries, *whatever school their parents* have chosen for them." *Id.* at 262 (Powell, J., concurring and dissenting) (emphasis supplied). See also S. Arons, *Compelling Belief: The Culture of American Schooling* (1982); Arons, "The Separation of School and State: *Pierce* Reconsidered," 46 *Harv. Ed. Rev.* 76 (1976); D. Kommers and M. Wahoske, eds., *Education and Freedom: Pierce v. Society of Sisters Reexamined* (1978); and R. McCarthy, J. Skillen, and W. Harper, *Disestablishment A Second Time: Genuine Pluralism for American Schools* (1982).

In enacting the statute challenged in this case, the Minnesota Legislature clearly intended to further the legitimate interest of the State in providing quality education for all children in that state, irrespective of whether the school attended by those children is owned and operated by the government or by other groups. Article VI, § 3 of the United States Constitution requires all state legislators as well as executive officers to take an oath of office that binds them to the same duty undertaken by judges to uphold the Constitution of the United States. *See* L. Tribe, *American Constitutional Law* 13-14, 27-28 (1978). This often overlooked fact supports the presumption of constitutionality that a validly enacted statute traditionally has enjoyed. *See, e.g., McGowan v. Maryland* 366 U.S. 420, 496 (1961). This presumption of constitutionality means that the statute challenged in the instinct case should be seen as a bona fide effort of the Legislature and the Governor of the State of Minnesota to promote the legitimate interests of the State in nondiscriminatory, quality education for all children in that state, and in diverse, pluralistic forms of educational experience.

Petitioners would have this Court invalidate the challenged statute on the sole ground that it lacks a valid, secular legislative purpose. (Petitioners' Brief, 67-76). One of the amici supporting the Petitioners likewise assails the validity of the purpose of this legislation, characterizing the facially neutral distribution of tax benefits in the statute as "a farce and a subterfuge." Brief Amicus Curiae of the Baptist Joint Committee on Public Affairs, at 12.

To accept the invitation of the Petitioners and of amici supporting them to reject the stated purpose of this legislation and to adopt the purpose that the Petitioners regard as "evident" would be to stray far beyond the record in this case. It would, moreover, run contrary to a virtually unbroken line of precedents in the Establishment Clause area. In *Epperson v.*

Arkansas, 393 U.S. 97 (1968), this Court invalidated a statute that made it unlawful "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals" on the ground that this statute was motivated not by a valid secular purpose but by a fundamentalist belief in the literal reading of the Book of Genesis. *Id.* at 109. *Epperson*, however, did not involve any form of state aid to nonpublic education.

The only decision of this Court relied upon by Petitioners or amici supporting them is *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). Far from supporting the Petitioners' convention that this Court should invalidate the Minnesota statute on this ground, *Nyquist* stands for the opposite conclusion. In *Nyquist*, Justice Powell wrote:

> we need touch only briefly on the requirement of a "secular legislative purpose." As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren. And we do not doubt — indeed, we fully recognize — the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools. *Id.* at 773.

All the other relevant precedents of this Court, support the finding of the Court of Appeals that the Minnesota legislature had a valid secular purpose in enacting the statute. See, e.g., *Bd. of Education v. Allen,* 392 U.S. 236, 243 (1968); *Walz v. Tax Commission,* 397 U.S. 664, 672-674 (1970); *Lemon v. Kurtzman,* 403 U.S. 602, 613 (1971); *Tilton v. Richardson,* 403 U.S. 672, 678-679 (1971); *Sloan v. Lemon,* 413 U.S. 825, 827-828 (1973); *Hunt v. McNair,* 413 U.S. 734, 741-742 (1973); *Meek v. Pittenger,* 421 U.S. 349, 363 (1979); *Roemer v. Bd. of Public Works of Maryland,* 426 U.S. 736, 754 (1976); *Wolman v. Walter,* 433 U.S. 229, 236 (1977); *Committee for Public Education and Religious Liberty v. Regan,* 444 U.S. 646, 653-654 (1980); *Widmar v. Vincent,* 454 U.S. 263, 271-272 (1981); *Larson v. Valente,* 456 U.S. 228, 102 S. Ct. 1673, 1687 (1982); *Larkin v. Grendel's Den,* ____ U.S. ____, 103 S. Ct. 505, 508 (1982). This Court should accept the finding that the challenged legislation has a valid secular purpose.

B. No Excessive Entanglement

This Court should likewise reject the Petitioner's attempt to confuse the secular purpose and excessive entanglement tests. Petitioners suggest that the Minnesota Legislature is faced with a dilemma. On the one hand, if it integrates this statute into its tax code, with the usual provisions for auditing tax returns to detect unlawful use of a tax provision, it would not be sufficiently rigorous in enforcing the prohibition against establishing religion. On the other hand, if it were to adopt what the Petitioners themselves characterize as a "Draconian measure" of auditing every return, it would be guilty of entangling itself excessively with religious groups. (Petitioner's Brief at 66). This false dilemma is hardly of Sartrean dimen-

sions, for the "Catch-22" solution devised by the Petitioners, if it can be called a solution, is not required by the precedents of this Court. As Chief Justice Burger, the principal author of the excessive entanglement test, *Walz, supra,* and *Lemon, supra,* has written:

> A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional. *Tilton v. Richardson,* 403 U.S. at 679.

See also Ripple, "The Entanglement Test of the Religion Clauses – A Ten Year Assessment," 27 *U.C.L.A. L. Rev.* 1195 (1980); Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 *U. Pitt. L. Rev.* 673 (1980); and Serritella, "Tangling With Entanglement: Toward a Constitutional Evaluation of Church-State Contacts," 44 *L. and Contemp. Problems* 143 (1981).

Indeed, it is precisely the avoidance of excessively intrusive governmental contacts with religious bodies that led this Court to sustain a similarly broadly available tax benefit in *Walz v. Tax Commision, supra.* In order to avoid this inescapable conclusion, Petitioners have characterized the deduction from gross income allowed by the Minnesota statute as "a government subsidy of the favored activity." (Petitioners' Brief at 25, and passim, especially at 50-62). To do so, however, is to misunderstand the nature of the tax benefit afforded by the legislation at issue in this case. In *Walz,* Chief Justice Burger wrote concerning property tax exemption, a similar exercise of self-restraint on the part of government of its power to collect

revenues, as follows:

> Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. . . . The government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or employees "on the public payroll." *Walz,* 397 U.S. at 32-33. See also at 680-694, (Brennan, J., concurring).

In a similar vein, a leading authority on Church-State matters, Dean M. Kelley, has written:

> The beauty of "tax exemption" as an arrangement for encouraging voluntary organizations is that it does not entail . . . entanglements and dependencies. . . . At least it does not oblige government to examine, inspect, evaluate, compare, audit, standardize regulate, or control such organizations, as would be the case if they were subsidized. Rather than attempting to assess their worth to the public as a basis for determining the degree of subsidy they deserve, government — by the mechanism of tax exemption — allows the *public* to make that evaluation and decision directly by the degree to which interested persons support the various organizations by their voluntary contributions. *Why Churches Should Not Pay Taxes* 32 (1977).

Kelley notes several operational distinctions between genuine subsidies and tax provisions that are passive in nature, such as

exemptions or deductions whereby the government forebears to collect revenue:

> 1. In a tax exemption, *no money changes hands* between government and the organization. There is no financial transaction with applications, checks, warrants, vouchers, receipts, accounting, or audits; ". . . government does not transfer part of its revenue. . . ."
>
> 2. A tax exemption, in and of itself, *does not provide one cent* to an organization. Without contributions from its supporters, it has nothing to spend. Government cannot create or sustain — by tax exemption — any organization which does not attract contributions on its own merits.
>
> 3. The *amount* of a subsidy is determined by the legislature or an administrator; there is no "amount" involved in a tax exemption because it is "open-ended"; the organization's income is dependent solely on the generosity of its several contributors, each of whom decides freely and individually how much he or she will give.
>
> 4. Consequently, there is *no periodic legislative or administrative struggle* to obtain, renew, maintain, or increase the amount, as would be the case with a subsidy; political allegiances are not mobilized to support or to oppose it; the energies of the organization are not expended in applying for, defending, reporting, qualifying, undergoing audits and evaluations, etc., and the resources of government are not expended in administering them. *Id.* at 33.

Shortly before *Walz* was decided, Boris I. Bittker, Sterling Professor of Law at Yale Law School, wrote:

> There is no way to tax *everything;* a legislative body,

no matter how avid for revenue, can do no more than pick out from the universe of people, entities, and events over which it has jurisdiction those that, in its view, are appropriate objects of taxation. In specifying the ambit of any tax, the legislature cannot avoid "exempting" those persons, events, activities or entities that are outside the territory of the proposed tax. In describing a tax's boundaries, the draftsman may choose to make the exclusions explicit ("All property except that owned by nonprofit organizations"), or implicit ("all property owned by organizations operated for profit"), but either way, the result is the same — taxpayers are separated from nontaxpayers. . . .

The federal income tax of current law, then, "exempts" nonprofit groups; and this quite naturally leads, on a quick glance, to the conclusion that they have been granted the "privilege" of "immunity." . . . Unless blinded by labels, however, one can view the federal income tax instead as a tax on income that inures in measurable amounts to the direct or indirect personal benefit of identifiable natural persons. So viewed, the Internal Revenue Code's "exemption" of nonprofit organizations is simply a way of recognizing the inapplicability to them of a concept that is central to the tax itself. Bittker, "Churches, Taxes and the Constitution," 78 *Yale L.J.* 1285, 1288, 1290-1291 (1969).

More recently Bittker and George Rahdert concluded:

The exemption of nonprofit organizations, from federal income taxation is neither a special privilege

nor a hidden subsidy. Rather, it reflects the application of established principles of income taxation to organizations which, unlike the typical business corporation, do not seek profit. Bittker and Rahdert, "The Exemption of Nonprofit Organizations from Federal Income Taxation," 85 *Yale L.J.* 299, 357-358 (1976).

Because of the passive character of the deduction at issue in this case, it is inappropriate to apply the same expectations of governmental regulation and control that frequently arise as conditions of a direct subsidy. For that reason, this Court should affirm the decision of the Court of Appeals that the Minnesota statute is not infirm by virtue of entangling the government excessively with religious bodies.

The Petitioners themselves have not pressed the claim that the Minnesota statute should be invalidated under the second aspect of the entanglement test. Several of the amici supporting the Petitioners, however, argue that this Court should invalidate the Minnesota statute because of its potential for political divisiveness along religious lines. *See, e.g.* Amicus Brief of Baptist Joint Committee on Public Affairs at 21-24, Amicus Brief of National Committee for Public Education and Religious Liberty et al. at 6-7, and Amicus Brief of National School Boards Association (NSBA) at 36-37. One such brief, for example, urges this Court to assure, "at all costs, the *absolute* separation of church and state . . . so that over the years, we will be certain to avoid the devastating consequences seen in places such as Iran." Amicus Brief of NSBA at 36 (emphasis in original).

Such counsel not only ignores the tendency of this Court "to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes" *Committee for Public Education and Religious Liberty v. Regan,* 446 U.S.

at 662, but also typifies the sort of "imaginable but totally implausible evils" to which Justice Marshall referred in his opinion in *Wolman v. Walter*, 433 U.S. at 260, n.6. The record, of course, is bare of any factual determinations to support these fears of the amici supporting the Petitioners. Nevertheless, this Court may wish to use this case to re-evaluate its position on the political divisiveness aspect of the excessive entanglement test. If it were to do so, it would not thereby be unleashing an avalanche of political Ayatolahs or even causing this country to slip down the perilous slope to Iran. For as long as this Court sits, there need be no fear that so overt and direct a relationship between the government and religious bodies generally or any religious body in particular would ever be tolerated. As Justice Powell observed in *Wolman, supra:*

> The risk of significant religious or denominational control over our democratic processes — or even of deep political division along religious lines — is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. *Wolman*, 433 U.S. at 263 (Powell, J., concurring and dissenting).

Moreover, as Justice Stewart observed in *Harris v. McRae*, 428 U.S. 297 (1980) the mere coincidence that a statute may coincide with the religious tenets of a particular church does not, without more, contravene the Establishment Clause. *Id.* at 319-320.

If this Court chooses to address the political divisiveness

theme, it should be aware, as Professor Tribe has put it, that:

> American courts have not thought the separation of church and state to require that religion be totally oblivious to government or politics; church and religious groups in the United States have long exerted powerful political pressures on state and national legislatures, on subjects as diverse as slavery, war, gambling, and education. To view such religious activity as suspect, or to regard its political activity as suspect, or to regard its political results as automatically tainted, might be inconsistent with first amendment freedoms of religious and political expression — and might not even succeed in keeping religious controversy out of public life, given the "political ruptures caused by the alienation of segments of the religious community." L. Tribe, *American Constitutional Law* 866-867 (1978) (footnotes omitted).

Since, moreover, there is no reliable historical evidence supporting the view of Professor Freund, "Public Aid to Parochial Schools," 82 *Harv. L. Rev.* 1680 (1969), on which this Court relied in *Lemon, supra,* when the test was created, it may be time for the Court to abandon the political divisiveness aspect of the excessive entanglement test. See Gaffney, "Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy." 24 *St. Louis U. L. J.* 205 (1980); and Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 *U. Pitt. L. Rev.* 673 (1980).

C. No Direct and Immediate Primary Effect of Advancing Religion

The most crucial test under the Establishment Clause for scrutinizing the Minnesota statute is the primary effect test, to which the Respondents devote considerable attention in their briefs. See also the careful discussion of the appropriate way of stating the primary effect test in the Amicus Brief filed by Citizens for Educational Freedom. As articulated most recently in *Larkin v. Grendel's Den*, ____ U.S. ____, 103 S. Ct. 505 (1982) this test requires that legislation not have the "direct and immediate effort of advancing religion." *Id.* at 508. A "remote and incidental effect advantageous to religion institutions" is not a sufficient basis to strike down a statute. *Id.*

The Minnesota statute challenged in this litigation is part of a broad program of tax benefits provided by the State to effectuate a wide variety of important public policy objectives. For example, the Minnesota tax code provides that in computing net income for state income tax purposes a taxpayer may deduct from gross incomes certain trade or business expenses and expenses for the production of income, MINN. STAT, § 290.09.2; all interest, *id.* § 290.09.3; taxes such as those paid to any other state, or inheritance taxes, *id.*, § 290.09.4; uncompensated losses, *id.*, § 290.09.5; bad debts, *id.*, § 290.09.6; depreciation, *id.*, § 290.09.7; medical expenses, *id.*, § 290.09.10; expenditures incurred in exploring and developing mineral resources, *id.*, § 290.09.25; and expenses incurred arising from the adoption of a child, *id.*, § 290.09.27. Petitioners seek to isolate subdivision 22 of § 290.09, providing for a deduction from gross income of certain educational

expenditures incurred at racially nondiscriminatory[1] public and nonpublic schools, and to characterize this provision as a direct governmental subsidy for paying a "user fee." Petitioners have not adduced any evidence that their novel way of characterizing the challenged provision correctly reflects the intent of the Minnesota Legislature. Even if this provision were intended as a special benefit for user fees, that fact alone would not suffice to invalidate the provision, any more that the provision for deductions for medical expenses or any of the other expenses enumerated above. See also § 213 of the federal Internal Revenue Code (providing a deduction from gross income for medical and dental expenses).

The challenged provision, then, does not have the direct and immediate primary effect of advancing religion. To the contrary, by refraining from defining a taxpayer's net income as including certain educational expenses, whether incurred at a public or a nonpublic school, the statute merely has the effect of allowing taxpayers to choose voluntarily to undertake such expenses.

As was suggested above in the discussion of valid secular purpose, the Minnesota Legislature may enact a statute intended to foster a healthy sense of pluralism and diversity in the transmission of meaning and value. To insist that such a statute has the direct and primary effect of advancing religion is to misconstrue the passive character of tax deductions. It is

[1]The Minnesota statute challenged here makes available a deduction only if the allowable expenditures are incurred at a school in compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. As was stated in the motion for leave to file this brief, p. vii, *supra*, amici subscribe to a policy of non-discrimination in admissions with regard to race, color, and national origin. Hence the question presented in *Bob Jones University v. United States*, No. 82-3, is not at issue here. For a careful statement of the value of nonpublic schools for promoting racial integration on a voluntary basis, see the Brief Amicus Curiae filed in this case by the Catholic League for Religious and Civil Rights.

to insist that the government may not even refrain from collecting a certain portion of revenues from taxpayers incurring certain legitimate educational expenditures at public or nonpublic schools. And it is to neglect the point that government need not (and after *Pierce, supra,* may not) monopolize the education of children. As Dean Kelley has stated:

> Many of the services performed and activities undertaken by exempt organizations are at least as meritorious and constructive as those for which tax funds are appropriated by the legislatures of the land. Just because government has the power to tax does not mean that governmental expenditures are of greater value, wisdom, effectiveness, or importance than nongovernmental ones; often quite the opposite. And citizens who try to carry out such constructive nongovernmental voluntary undertakings should be encouraged rather than penalized for doing so. They each already pay their (presumably) fair share of taxes; they should not be taxed again for what they voluntarily contribute to endeavors that help to strengthen the fabric of society (and which, in the case of churches, may also be performing an essential social function). Instead, they should be encouraged in such activities by the neutral, self-assessing, and self-allocating incentives of tax exemption and deductibility of contributions. D. Kelley, *Why Churches Should Not Be Taxed* 90-91 (1978).

In *Nyquist, supra,* the beneficiary class appeared to this Court to be so narrow as to require invalidation of the New York tax benefit challenged in that case. Here there is a true deduction rather than a credit, which cannot fairly or accurately be described as a direct governmental subsidy. The

breadth of the beneficiary class in the Minnesota statute, moreover, requires that this statute be sustained, *Nyquist*, 413 U.S. at 782, note 38, citing *Everson v. Bd. of Education*, 330 U.S. 1 (1947) and *Bd. of Education v. Allen*, 392 U.S. 236 (1968).

As in *Walz, supra*, churches are not singled out for special, favorable treatment; rather schools operated by religious bodies are included along with other independent schools (such as the Montessori schools and military academies) and with public schools as eligible institutions which a taxpayer's dependent children may attend. As in *Walz*, moreover, it is not merely these church-related schools which might derive some incidental and remote benefit from the tax provisions for deductions from gross income, but also a host of other charitable organizations, private business enterprises, doctors and dentists and the like. The statute, in short, does not have the immediate and direct effect of advancing religion, and should therefore be sustained.

II. THE HISTORIC PURPOSE OF THE RELIGION CLAUSES OF THE FIRST AMENDMENT WAS NOT TO PROHIBIT GENERALLY AVAILABLE TAX BENEFITS INDIRECTLY BENEFITING ALL RELIGIOUS BODIES ON A NEUTRAL BASIS, BUT WAS TO PROHIBIT THE GOVERNMENT FROM IMPOSING ANY PARTICULAR DENOMINATIONAL OR SECTARIAN BELIEF OR PRACTICE INVOLUNTARILY ON THE PEOPLE.

This Court has often made use of legal history as a way of discharging its responsibility of explaining to the nation the

reasons that undergird its constitutional holdings. *See, e.g., Larkin v. Grendel's Den,* 103 S. Ct. at 510 (1982); *Larson v. Valente,* 102 S. Ct. at 1683-1684 (1982); *McDaniel v. Paty,* 435 U.S. 618 (1978); *Lemon v. Kurtzman,* 403 U.S. 602, 625-642 (1971) (Douglas, J., concurring), and 642-661 (Opinion of Brennan, J.); *Walz v. Tax Commission,* 397 U.S. 664, 676-680 (1970), 681-687 (Brennan, J., concurring), and 704-727 (Douglas, J., dissenting), *Abington School District v. Schempp,* 374 U.S. 203, 230-304 (1963) (Brennan, J., concurring), and *Everson v. Bd. of Education,* 330 U.S. 1 (1947) and 63-72 (Rutledge, J., dissenting). Some legal scholars have written approvingly of the Court's use of history in *Everson.*[2] But the overwhelming majority of legal commentators has been sharply critical of the Court's use of history in *Everson* and other Establishment Clause cases.[3]

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[2]*See, e.g.,* R. Butts, *The American Tradition in Religion and Education* (1950); R. Dixon, "Religion, Schools and the Open Society," 13 *J. Pub. L.* 267, 278 (1964); L. Pfeffer, "The Case for Separation," in J. Cogley, Ed., *Religion in America: Original Essays on Religion in a Free Society* (1968).

[3]*See, e.g.,* E. Corwin, "The Supreme Court as a National School Board," 14 *Law & Contemp. Probs.* 3 (1949); E. Norman, *The Conscience of State in North America* (1964); J. O'Neill, *Religion and Education Under the Constitution* (1949); C. Rice, *The Supreme Court and Public Prayer* (1964); C. Antieau, A. Downey, E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964); M. Howe, *The Garden and the Wilderness* (1965); A. Sutherland, "Historians, Lawyers, and 'Establishment of Religion,' " in D. Gianella, Ed., V *Religion and the Public Order* 27 (1969); L. Levy, "No Establishment of Religion: The Original Understanding," in *Judgments: Essays on American Constitutional History* 169 (1972); W. Berns, *The First Amendment and the Future of American Democracy* (1976); M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978); R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982).

Whether this Court should rely on legal history in its opinions is itself a debatable matter.[4] Justice Brennan, for example, has expressed the view that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." *Schempp*, 374 U.S. at 234 (Brennan, J., concurring). On the other hand, it should not be thought that "an awareness of history and an appreciation of the aims of the Founding Fathers" is without relevance to contemporary constitutional adjudication, or that the Justices should as a matter of course refrain from referring to legal history when that is appropriate. Indeed, it should be recalled that the view of Justice Brennan mentioned above was expressed within his most expansive account of the history underlying the Religion Clauses, *Schempp* 374 U.S. at 230-304 (Brennan, J., concurring).

If judges reviewing cases involving the Religion Clauses prefer to resolve such cases by reference to history, they should be aware of the complexity of the historical aims of the Founding Fathers. It is plainly insufficient to invoke the past vaguely or erroneously as the rationale for an inadequate resolution of a concrete contemporary problem.

The members of the First Congress who spoke about the First Amendment were of one mind that reasonable accommodation of religious beliefs and practices was not only constitutionally permissible, but also desirable as a matter of public policy. The general thrust of the framers' intention is ably stated in a recent historical study by Michael Malbin:

> All of the speakers [on the First Amendment in the first Congress] . . . agreed that the Bill of Rights should prohibit the new government from establishing a national religion. . . . What should be emphasized

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[4]*See, e.g.*, C. Miller, *The Supreme Court and the Uses of History* (1969), and literature cited therein.

here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. M. Malbin, *Religion and Politics,* note 3, *supra,* at 9, 15.

A more recent historical study confirms Malbin's conclusions. Professor Robert Cord summarizes his own findings as follows:

> [R]egarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite. R. Cord, *Separation of Church and State,* note 3, *supra,* at 15.

Opponents of legislation such as that under review in the instant case frequently make reference to the anti-establish-

ment perspective of James Madison. For example, Madison's famous Memorial and Remonstrance in the Virginia House of Burgesses against Patrick Henry's proposal to use public funds to support Christian teachers of religion has been attached to dissenting opinions in *Everson*, 330 U.S. at 63-72, and *Walz*, 397 U.S. at 719-727. Historians have noted the weakness of relying on the struggle in Virginia over Patrick Henry's bill as a way of understanding the mind of the Framers. For example, Professor Leonard Levy writes:

> [T]he details of no other state controversy over church-state relationships are so familiar. If, however, one is concerned with attempting to understand what was meant by "an establishment of religion" at the time of the framing of the Bill of Rights, the histories of the other states are equally important, notwithstanding the stature and influence of Jefferson and Madison as individuals. Indeed, the abortive effort in Virginia to enact Patrick Henry's assessment bill is less important than the fact that five states actually had constitutional provisions authorizing general assessments for religion, and a sixth (Connecticut) provided for the same by statute. Had the assessment bill in Virginia been enacted it would simply have increased the number of states maintaining multiple establishments from six to seven. L. Levy, "No Establishment of Religion: The Original Understanding," note 3, *supra*, at 201.

It was Madison, moreover, who suggested that the meaning of a constitutional provision is to be ascertained from considering the "true sense in which it was adopted by the states." Letter to Thomas Ritchie, September 15, 1821, in G. Hunt, Ed. IX *Writings of James Madison* 272 (1909). At the Virginia convention in 1788 called to ratify the new

Constitution adopted in Philadelphia, Madison himself stated:

> Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment. . . . The United States abound in such a variety of sects, that it is a strong security against religious persecution, and it is sufficient to authorize a conclusion, that no one sect will ever be able to outnumber or depress the rest. J. Elliott, Ed., III *Debates on the Federal Constitution* 330 (1836).

Professors Antieau, Downey, and Roberts have suggested that the views expressed at the Delaware General Assembly, which ratified the First Amendment on January 27, 1790, were fairly representative of the prevailing view in the other ratifying states. Antieau and his colleagues summarized those views as follows:

> The people of Delaware had come to believe during the period of the ratification of the First Amendment that participation in religious exercises should be voluntary. This did not mean that the state must be blind to religion as an institution in the lives of her citizens; the morality and prosperity of the community depended upon religion. Thus the state could recognize and protect religion, provided that this official recognition was extended on a nonpreferential basis. . . . C. Antieau et al., *Freedom from Federal Establishment,* note 3, *supra,* at 147.

In this view, the Religion Clauses were understood to prohibit exclusive or preferential privileges for any one sect or religious group. "A policy of religion was not contemplated and would have found emphatic disapproval. It was, in short, a policy of 'non-establishment' or equality in law for all religious

groups." *Id.* at 160; see also W. Berns, *The First Amendment and the Future of American Democracy* (1976).

When Madison was elected to the First Congress and served as floor manager of the First Amendment, he did not depart from this view that the First Amendment was intended to prohibit a nationally preferred religion. This may be seen in the version of the First Amendment that Madison submitted to the House of Representatives: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." 1 *Annals of Congress* 434 (June 8, 1789).

Madison also endorsed the method of examining the "practices of the times" in order to ascertain the meaning of the Establishment Clause. Letter to M. L. Hurlbert, May, 1830, in G. Hunt, Ed. IX *Writing of James Madison* 370-375 (1909). Employing this criterion, one can safely conclude that history is on the side of the Respondents. For the members of the First Congress, including Madison, appropriated funds for the construction of facilities in federal territories that were explicitly to include religious instruction among their purposes. See C. Antieau et al., *Freedom from Federal Establishment* (1964), and R. Cord, *Separation of Church and State* (1982).

The original meaning of the Establishment Clause is reflected, for example, in the platform of Jefferson's Democratic-Republican Party in 1800, which asserted its support of "freedom of religion, and opposition to all maneuvers to bring about legal ascendancy of one sect over another." W. Blakely, ed., *American State Papers Bearing on Sunday Legislation* 166 (1911). Consistent with this interpretation of the evil that the First Amendment was intended to correct, Justice Story wrote: "The real object of the amendment was . . . to exclude

all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." J. Story, III *Commentaries on the Constitution of the United States* 166 (1833).

If legal history is to be employed in the resolution of Establishment Clause cases such as the case at bar, those who do so should be more aware of the complexity of that history than is manifest in the version of history adopted by this Court in *Everson*. As Professor Tribe has stated, "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers — or to a coherent vision of religious autonomy in the affirmative state." L. Tribe, *American Constitutional Law* 834 (1978).

The Minnesota statute challenged in this case conforms to the original purpose and intent of the Establishment Clause. The statute is neutral on its face, and in its operation it is utilized by parents with students in public as well as private schools. The statute, which has been in effect for twenty-seven years, has not resulted in the domination of any particular religion in Minnesota.

By affirming the judgment of the Court of Appeals, this Court could clarify that the historic purpose of the Religion Clauses was not to prohibit all forms of state assistance to church-related education (even passive restraints such as exemption from payment of property tax or, as was later to develop, the sort of genuine tax deduction at issue here), but to prohibit the government from imposing any sectarian or denominational viewpoint or practice involuntarily upon the people.

CONCLUSION

For the reasons stated above, amici urge that this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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NOTE: Paul Lewis (J.D. Cand., 1983, Notre Dame Law School) and Robert Casey (J.D. Cand., 1983, Notre Dame Law School) were of assistance on this brief.

CERTIFICATE OF SERVICE

State of Indiana)
) ss.:
St. Joseph County)

On this _____ day of February, 1983, before me, a Notary Public for the State of Indiana and St. Joseph County, the undersigned, Edward McGlynn Gaffney, Jr., personally appeared and, being duly sworn to according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the Motion for Leave to File a Brief Amicus Curiae and the Brief Amicus Curiae of the Council for American Private Education et al. in support of the Respondents to the following attorneys of record:

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Sworn to and Subscribed before me
the day and year aforesaid.

Rosemary K. Reiter, Notary Public

MOTION FILED
NOV 14 1982

No. 82-195

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October Term, 1982

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vs.

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AN *AMICUS CURIAE* AND BRIEF OF AN *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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1982—Northwest Brief Printing Co., 3010 2nd St. No., Minneapolis 55411—588-7506

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Minnesota Association of School Administrators, Minnesota Association of Secondary School Principals, Association of Metropolitan School Districts and Minnesota Association of School Business Officials (herein collectively "Minnesota *Amicus Curiae*") pursuant to Rule 36, Rules of the Supreme Court of the United States, respectfully move this Court for leave to file the accompanying brief in this case as *Amicus Curiae* in support of petitioners. In support of this motion the Minnesota *Amicus Curiae* submit the following:

1. The Minnesota Association of School Administrators ("MASA") is an organization of 639 public elementary and secondary school administrators. The MASA has representatives from virtually all of the 437 Minnesota school districts.

2. The Minnesota Association of Secondary School Principals ("MASSP") is an organization of approximately 1100 secondary school principals. The MASSP's membership is open to all Minnesota secondary school principals and while predominantly consisting of public school principals includes principals from sectarian and non-sectarian private schools.

3. The Association of Metropolitan School Districts is an organization of 30 independent and joint intermediate suburban public school districts located in the 7 county Minneapolis/St. Paul metropolitan area.

4. The Minnesota Association of School Business Officials is an organization comprised of 336 active members. The membership includes business managers, school superintendents, accountants and operations supervisors from 138 Minnesota school districts involved in the business affairs of their respective school districts.

5. A goal of each of the Minnesota *Amicus Curiae* is to promote the general educational programs of the Minnesota public schools through leadership in the educational and decision-making processes and to be an unbiased professional advocate for the individual educational needs of children and youth in the state of Minnesota. Towards these ends the Minnesota *Amicus Curiae*, along with others, on March 23, 1981 issued a policy statement (Attached as

Exhibit A) opposing income tax devices which tend to divert public funds to nonpublic school systems.

6. The Minnesota *Amicus Curiae* have been active on the national, state and local levels in examining the problems of public education. The Minnesota *Amicus Curiae* believe that the integrity and quality of public education will be jeopardized if the decision of the Court of Appeals were affirmed. In contrast, neither petitioners nor respondents are advocates having a direct interest in public education in Minnesota as do the Minnesota *Amicus Curiae*. Under such circumstances there are facts and questions of law that will not be adequately presented by the parties.

7. The Minnesota *Amicus Curiae* have received the consent of the petitioners, but have been denied the consent of the respondents to the filing of their *Amicus Curiae* Brief.

WHEREFORE, the Minnesota *Amicus Curiae* respectfully requests that it be permitted to file its *Amicus Curiae* Brief in this action.

Dated: _____.

STOLPESTAD, BROWN & SMITH
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EXHIBIT A

JOINT STATEMENT IN OPPOSITION TO TUITION TAX CREDITS, INCOME TAX DEDUCTIONS, AND/OR VOUCHERS

The American public school system—the greatest endeavor to educate the masses in the history of mankind—is in serious jeopardy. Continuing efforts to divert revenue from public elementary-secondary schools is cause for alarm.

Federal/state government directions in public education seeks to assure the principles of equal opportunity, nondiscriminatory programs and practices, openness, due process, and adherence to the doctrine of separation of church and state. The idea that a competitive educational system will solve the problems confronting public schools has been espoused by some. In light of the few legislative mandates governing nonpublic schools, it hardly seems reasonable to expect the public schools to compete when the rules are not the same. Further, diverting funds from the public schools in support of a competitive system will not improve the public education system.

The public school system is necessary to the continued success of our democratic society. The basic premise upon which the public school system is founded, equal opportunity, is the cornerstone of democracy. Nonpublic elementary-secondary education will remain as an alternative to the individual. However, diverting desperately needed revenue from public education to support nonpublic schools is an overt statement of a lack of confidence in the education system whose very existence, structure, and operation can be credited to some of those who now wish to abandon it, i.e., Congress, Legislature.

The Minnesota Legislature and the United States Congress in coordination with local school boards have made tremendous strides in developing a public school system which

now more effectively than at any time in our history comes closer to providing our ultimate goal of equal education. A negative reaction to the efforts of the Congress and Legislature to guarantee equal opportunity in public schools has resulted in an increase in the number of nonpublic schools in the United States.

Efforts to technically circumvent the concept of separation of church and state by public financing of any services to nonpublic schools, in fact, violates that concept. At a time when religious activity is being judicially removed from public school it is inconsistent for the Legislature and Congress to be entertaining the idea of channeling billions of public tax dollars to support nonpublic schools, most of which are religious institutions.

It is urgent that all organizations and citizens who cherish public education unite for the purpose of defeating federal and state attempts to further divert funding from the public school system to a nonpublic school system through tuition tax credits, income tax deductions, and/or voucher systems.

* * * * *

This position statement was prepared by representatives from the following organizations:

Association of Metropolitan School Districts
Minnesota Association of School Administrators
Minnesota Association of Secondary School Principals
Minnesota Association of School Business Officials
Minnesota Education Association
Minnesota Elementary School Principals Association
Minnesota Federation of Teachers
Minnesota School Boards Association
Retired Educators Association of Minnesota

If further information is needed, please contact Norm Maguire, Executive Director, MASA 224-1828.

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Respondents.

BRIEF OF THE MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS, MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, ASSOCIATION OF METROPOLITAN SCHOOL DISTRICTS AND MINNESOTA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Minnesota Association of School Administrators, Minnesota Association of Secondary School Principals, Association of Metropolitan School Districts and Minnesota

Association of School Business Officials (herein collectively "Minnesota *Amicus Curiae*") respectfully request this Court to reverse the decision of the Eighth Circuit Court of Appeals in this case. The Minnesota *Amicus Curiae* have been active, unbiased, professional advocates of public education on national, state and local levels. The Minnesota *Amicus Curiae* believe that the statute involved in this case violates the doctrine of separation of church and state. The effect of such a statute is to pit public and parochial schools against each other for public funds. This has been the experience in Minnesota under such laws. Affirmance of the Eighth Circuit's opinion will further aggravate this situation.

QUESTION PRESENTED FOR REVIEW

Whether the challenged statute, Minn. Stat. §290.09 (22) (1978), which provides a state income tax deduction for certain expenses, including tuition, for the education of children attending elementary and secondary schools, and whose benefits flow overwhelmingly to parents of children attending parochial or religious affiliated nonpublic schools violates the Establishment Clause of the First Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

STATUTE INVOLVED

The statute involved is part of the Minnesota income tax statutes, entitled "Income and Excise Taxes", Minn. Stat. C. 290, §290.09. Subdivision 22, relating to deductions from gross income, reads as follows:

> Subd. 22. Tuition and transportation expense. The amount he has paid to others. not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12. for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

SUMMARY OF ARGUMENT

The constitutionality of the Minnesota income tax deduction involved in this case is clearly controlled by *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413

U.S. 754 (1973). Contrary to *Nyquist*, the Eighth Circuit made a purely facial analysis, thus failing to apply the "primary effect" test required by the Establishment Clause. Had the Eighth Circuit examined the actual impact of the tuition deduction, it would have reached a contrary conclusion. The correct decision was reached by the First Circuit in 1980 when it was confronted with an identical statute and facts. *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980).

If, on the other hand, the Supreme Court shares the concern voiced by the trial court over the adequacy of the factual records, summary judgment was improvidently granted. Serious consideration, then, should be given to remanding the entire matter for an evidentiary hearing.

ARGUMENT

A. INTRODUCTION

The central issue is whether the Minnesota income tax deduction is constitutionally acceptable under the Establishment Clause of the First Amendment to the United States Constitution. In view of the record, as it now stands on appeal, the challenged statute clearly is controlled by *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413 U.S. 754 (1973). *Nyquist* held unconstitutional certain New York tax credits and deductions for educational expenses, the benefit of which inured primarily to parents sending their children to parochial schools. Likewise, Minn. Stat. §290.09(22) (1982), authorizing a deduction from gross income for tuition, textbooks, and transportation expenses incurred on behalf of dependents attending elementary or secondary schools, unquestionably inures principal-

ly to the benefit of those parents who send their children to nonpublic, sectarian schools. The primary effect is the impermissible subsidy of religious education by the state of Minnesota.

The Eighth Circuit's equivocal attempt to distinguish the decisions of the First Circuit in *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980) and the Third Circuit in *Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514 (3rd Cir. 1979) is simply unconvincing. In particular, *Norberg* was based on a statute and facts indistinguishable from the Minnesota statute challenged in the present case. *Mueller v. Allen*, 676 F.2d 1195, 1200 (8th Cir. 1982). In *Byrne* and *Norberg* the courts found no basis for distinguishing this Court's decision in *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413 U.S. 756 (1973) which held certain education expense tax credits and deductions unconstitutional as violative of the Establishment Clause.

The statistical proof offered by the petitioners demonstrates the effective application of the tax deduction. Tuition constitutes the bulk of the deductions under the challenged statute. Minnesota, with very few exceptions, does not charge tuition for public elementary and secondary education. Only 79 Minnesota school children paid tuition to attend public schools during the 1978-79 school year and only 40 the previous school year. Petition for Writ of Certiorari, pp. 3-4.

Nonpublic education, of course, is not free; parents must pay tuition for their children to attend private schools. The petitioners introduced evidence supplied by the respondents that for the school years 1978-79 and 1979-80 more than 95% of the children attending private schools in Minne-

sota attended schools considering themselves to be sectarian. *Mueller v. Allen*, 514 F.Supp. 998, 1001 (1981). Undeniably, the overwhelming portion of taxpayers qualifying for benefits from the challenged tax deduction do so by reason of tuition paid to religious affilated schools.

B. THE EIGHTH CIRCUIT FAILED TO APPLY "PRIMARY EFFECT" TEST.

Since *Walz v. Tax Commissioner*, 397 U.S. 664 (1970), this Court has applied a three-pronged test of constitutionality under the Esablishment Clause. Under that test, governmental action is impermissible if (1) its purpose is the advancement or inhibition of religion, or (2) its principal effect is the advancement or inhibition of religion, or (3) it fosters excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) and *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413 U.S. 756, 772-3 (1973). The inconsistency among the Circuits revolves around their respective applications of the primary effect part of this test. The Eighth Circuit not only adopted an inconsistent position, but virtually eliminated the primary effect part from the tripartite test.

Through a purely facial analysis, the Court of Appeals relied solely on the fact that the Minnesota statute appears neutral on its face. The Court ignored the practical and obvious effect of this statute. Judgment must turn on whether particular acts have "the effect" of the establishment or interference with religious beliefs and practices. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970) and *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413 U.S. 756, 774 (1973).

Confronted by an identical statute and similar facts, the

First Circuit examined the actual impact of the tuition deduction. Specifically, that Court of Appeals, in a well-reasoned, unequivocal and straightforward manner, found that the primary effect of the tax deduction was the advancement of religion. *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855, 860 (1980). The First Circuit, although recognizing the facial neutrality of the statute, rightfully concluded that the more important question is its primary effect. *Norberg*, 630 F.2d at 858-9. The Eighth Circuit even acknowledged such an effect:

> [W]e are concerned with the fact that we are dealing with an indirect state subsidy of tuition which can be viewed "as an incentive to parents to send their children to sectarian schools, or as a reward for having done so. . . . to preserve and support religion-oriented institutions." *Sloan v. Lemon*, 413 U.S. 825, 832, 93 S.Ct. 2982, 2986, 37 L.Ed.2d 939 (1973). We are well aware that we are not dealing with secular textbooks or bus rides but with tax benefits for tuition payments to elementary and secondary institutions, some of which provide religious training along with secular education.

Mueller, 676 F.2d 1195, 1204 (8th Cir. 1982). But, then, the Eighth Circuit limited its review to a facial analysis, stating:

> [T]he Minnesota statute has not singled out a class of citizens for a special economic benefit. It is neutral on its face; and, under the facts presented here, we cannot reject this facial neutrality as mere window dressing.

Mueller, 676 F.2d at 1204.

The facial examination proffered by the Eighth Circuit will not suffice. A court confronted by the Establishment

Clause must look to the practical effects of the law in question. This Court, in *Nyquist*, measured the degree of scrutiny required:

> [T]he propriety of a legislature's purposes may not immunize from further scrutiny a law which either has the primary effect that advances religion, or which fosters excessive entanglement between church and State. Accordingly, we must weigh each . . . aid provisions challenged . . . against these criteria of effect and entanglement.

Nyquist, 413 U.S. at 774.

Mueller purports even to distinguish *Nyquist* by noting that the Minnesota statute creates a "true tax deduction" which is passive in nature in that any benefit to religious education would be incidental and indirect rather than an affirmative grant, subsidy or reward. *Mueller*, 676 F.2d at 1205-6; See *Nyquist*, 413 U.S. at 790, n. 49. But, is the "effect," in substance, any different simply because a parent receives a tax deduction for tuition paid rather than a tax credit? Both provide the same monetary incentive, i.e., to send one's children to a sectarian school. In this regard, the Supreme Court observed in *Nyquist:*

> In practical terms there would appear to be little difference, for purposes of determining whether such aid as the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under §2. The qualifying parent under either system receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obligated to pay over to the State.

Nyquist, 413 U.S. at 790-91.

In *Nyquist*, this Court was confronted with several sections of the "elementary and secondary education opportunity program." Section 2 established a program of tuition reimbursements to parents of children attending elementary or secondary nonpublic schools. Sections 3, 4, and 5 of the challenged law were designed to provide tax relief in the form of a credit/deduction hybrid. In concluding that each section was unconstitutional, this Court found nothing constitutionally distinguishable between the tax credit versus the credit/deduction hybrid. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obligated to pay over to the State. The tax deduction in this case, while varying between taxpayers, has the same calculated effect, "to reduce by an arbitrary amount the sum he would otherwise be obligated to pay over to the State." *Nyquist*, 413 U.S. at 790-91. The constitutionality of his tax benefit does not turn on the label accorded it. *Nyquist*, 413 U.S. at 789.

The Eighth Circuit places great importance on the fact that "all citizens" may reap benefits from this tax deduction. While this may be true facially, close scrutiny of the practical application of this statute leads to the inevitable and unalterable conclusion that the "primary effect" of this statute is to provide tax benefits for parents whose children attend parochial schools.

Without question, the most significant expense to be incurred by parents in the education of their school children in sectarian schools is tuition. Minnesota, like other states, has legislatively declared that public elementary and secondary education will be provided to its citizens free. Minn.

Stat. §120.72 (1982). Similarly, Minnesota prohibits the assessment of charges by public schools for most, if not all, of the items defined as textbooks under Section 290.09 (22). Minn. Stat. §120.74, subd. 1 (1982). This leaves parents of public education students with deductions only for the minimal expense of pencils, paper, tennis shoes, etc. as deductions under Section 290.09(22). In contrast, nonpublic education is not free. The parents must pay for items such as: tuition, textbooks, workbooks, art materials, laboratory supplies, pencils, paper, tennis shoes. Clearly, parents of students attending nonpublic schools will have much higher expenses than the parent whose children attend public schools. It is further uncontroverted that over 95% of the children attending nonpublic schools in Minnesota are enrolled in schools which are religiously affiliated. For the 1978-1979 school year, 96.29% of the nonpublic school children attended religious schools and the following year, this figure was 95.44%. *Mueller v. Allen,* 676 F.2d 1195, 1198 (8th Cir. 1982). While facially the challenged statute may appear to provide tax benefits to "all citizens," clearly the primary and overwhelming benefit will inure to those parents whose children attend parochial schools. As in *Nyquist,* "[I]t takes little imagination to perceive the extent to which States might openly subsidize parochial schools. . . ." *Nyquist,* 413 U.S. at 779.

The Minnesota *Amicus Curiae* are keenly aware of the constant pressure upon public school budgets and the total reliance by both elementary and secondary levels upon state aid (distributed on a formula basis in Minnesota). Persistent inflation and declining enrollments have accentuated these pressures resulting in school consolidations and teacher layoffs. One of the manifestations has been renewed ef-

forts by the secular schools to dip even more into the State's purse. As recently as the 1981-82 session of the Minnesota Legislature, bills were introduced in both the House of Representatives and the Senate designed to increase the maximum deduction amount in Minn. Stat. §290.09(22) from $500 and $700 to $1,000 and $1,400, respectively. *H.F.* 242 and *S.F.* 318, 72d Minnesota Legislature (1981). Inevitably efforts will be made at the federal level to enact similar tax devices. Judicial sanction of this tax device will lead to even greater entanglement and further subsidy of parochial schools by both state or federal governments.

The Eighth Circuit's analogy to charitable contribution deductions allowed under I.R.C. §170 is simply a distraction. Whether this Court has ruled upon the constitutionality of such charitable deductions is immaterial. That question is not before the Court and need not be decided. See, e.g. *Solesbee v. Balkcom*, 339 U.S. 9, 11, reh. den. 339 U.S. 926 (1949). The payment of tuition differs substantially from a charitable contribution. Charitable contributions are derived from a detached and disinterested generosity and not from the anticipation of economic benefits. Tuition payments, in essence, are the purchase of services. See *Winters v. Comm. Internal Revenue*, 468 F.2d 778 (2d Cir. 1972).

C. IF SUFFICIENCY OF STATISTICAL EVIDENCE DOUBTED, SUMMARY JUDGMENT MAY BE INAPPROPRIATE.

In light of *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980), the record in this case is more than adequate to provide the factual basis upon

which the unconstitutionality of the challenged statute can be established. Faced with identical facts, established after a full hearing the trial court "drew the reasonable inference that 'the overwhelming majority of parents eligible for the challenged tuition deduction send their children to sectarian schools.' . . . [and that] the Rhode Island tuition deduction would confer a tax benefit along nearly solid sectarian lines." [Citations omitted.] *Norberg*, 630 F.2d at 859-60.

The trial court in *Mueller* appears to have disregarded the attacks by respondents upon petitioners' evidentiary affidavits[1], *Mueller v. Allen*, 514 F.Supp. 998, 999 (D. Minn. 1981). Thereafter, the trial court, in its memorandum opinion discussed at length petitioners' statistical analysis. However, in its conclusion, Judge Renner stated, for the first time: "Plaintiffs' statistical argument lacks credibility by reason of omissions of serious significance." *Mueller*, 514 F.Supp. at 1002-03. This concern was echoed by the Eighth Circuit. The trial court's concluding comment strongly suggests that indeed there may have been genuine issues as to material facts. If such were the case, then disposition of this matter by summary judgment clearly was inappropriate and premature. Fed. R. Civ. P. 56; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The First Circuit questioned the precedential value of *M.C.L.U. v. Roemer*, 452 F.Supp. 1316 (D. Minn. 1978) because of an insufficient factual basis. *Norberg*, 630 F.2d at 861. Assuming the statistical omissions, which the trial

[1]There is ambiguity in the District Court's statement, "There may well be merit to defendants' objections [regarding plaintiffs' affidavits], but for purposes of this opinion, they are not being considered." It is unclear whether the District Court was not giving further consideration to the objections or the affidavits themselves.

court viewed as being of serious significance, are material, an incomplete factual record, made in the absence of an evidentiary hearing, could undermine the precedential value which the Supreme Court's decision in this case might otherwise have.

If such factual disputes were to exist, it would appear, also, that the Eighth Circuit failed to observe Rule 56's mandate. In *Walling v. Fairmont Creamery Co.*, 139 F.2d 318, 322 (8th Cir. 1943), the Circuit Court stated:

> On a motion for summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the Court. . . . on appeal from an order granting a defendant's motion for summary judgment the Circuit Court of Appeals must give the plaintiff the benefit of every doubt.

Under such presumed circumstances, the Court should remand this case to the District Court with directions to require a full evidentiary hearing and to render, along with its reasoned decision, a full set of findings. Thus, facts necessary to reach a decision regarding the primary effect of the challenged statute may be established.

CONCLUSION

A strong public education system is essential to the continued success of our democratic society. The cornerstone of our democracy is a well-educated populace. Continuing efforts to divert revenue from public elementary and secondary schools is cause for alarm. While nonpublic elementary and secondary schools will remain as an alternative for

the individual, diverting revenue from public education to support nonpublic, primarily religious schools is not only detrimental to our public education system, it violates the concept of separation of church and state. This Court in *Nyquist* involving New York tax legislation held unconstitutional a statute according tax benefits to parents who paid tuition for children attending parochial schools. In *Norberg* the First Circuit, with nearly an identical tax statute and statistical evidence, concluded that the primary effect was to confer tax benefits along sectarian lines to parents sending their children to parochial schools. The Minnesota *Amicus Curiae* urge this Court to find Minn. Stat. §290.09 (22) unconstitutional and enjoin its further enforcement. The decision of the Eighth Circuit should be reversed with directions to enter judgment in favor of the petitioners.

Respectfully submitted,

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MOTION FILED
MAR 8 1983

No. 82-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER and JUNE E. NOYES, *Petitioners*,

v.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN, and DOROTHY DEHAAN, *Respondents*.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ON BEHALF OF

MOUNTAIN STATES LEGAL FOUNDATION

THE NEW COALITION FOR SOCIAL AND ECONOMIC CHANGE

THE NATIONAL TAXPAYERS UNION

THE AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES

and

THE EDUCATION VOUCHER INSTITUTE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

Mountain States Legal Foundation, the New Coalition for Social and Economic Change, the National Taxpayers Union, the American Association of Presidents of Independent Colleges and Universities, and the Education Voucher Institute respectfully move this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae*. In support of this motion, these organizations state:

1. Mountain States Legal Foundation is a non-profit, membership, public interest legal foundation. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom.

2. The New Coalition for Social and Economic Change is an organization established for the purpose of developing innovative, free market solutions for the problems of black Americans.

Among its proposals are education tax credits, which will expand educational opportunities for American blacks.

3. The National Taxpayers Union is a non-partisan, non-profit organization dedicated to representing the interests of American taxpayers, and has been active in drafting and generating public support for education tax credit proposals.

4. The American Association of Presidents of Independent Colleges and Universities is an organization comprised of 192 presidents of private institutions of higher education. The Association seeks to enhance the ability of private sector education to thrive and continue to provide quality leadership for America.

5. The Education Voucher Institute is dedicated to the research and development of expanded and accessible educational alternatives through free market mechanisms.

6. All of the organizations presenting this motion are vitally interested in the outcome of this litigation. They are committed to the ability of states to broaden educational alternatives for their citizens. The members of the organizations will benefit by expanded educational opportunities and responsible use of tax dollars. The interests of *amici* are broader than those of the parties herein, allowing them to bring an important perspective which can shed new light on the important issues at stake in this lawsuit.

For the foregoing reasons, it is respectfully requested that this Motion for Leave to File the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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Wooley v. Maynard, 430 U.S. 705 (1977)	6
BOOKS AND PERIODICALS:	
J. Cibulka, T. O'Brien, and D. Zewe, Inner-City Private Elementary Schools: A Study (1982)	11,12,13, 14,15,18
J. Coleman, T. Hoffer, and S. Kilgore, Public and Private Schools (1981)	10,11,12, 13,14,15
A. Greeley, Catholic High Schools and Minority Students (1982)	8,10,11, 12,14,15, 17,18,19
J. Rosenblatt and H. Gimlin, Education Tax Credits, 2 Editorial Research Rep. 595 (1981)	10,13
T. Sowell, Black Education: Myths and Tragedies (1972)	11,13
W. Williams, Inner City Parents and Freedom of Choice, Black Education and The Inner City (1981)	13,14,15

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BRIEF AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

INTEREST OF THE AMICI CURIAE

All of the *amici* are national organizations vitally interested in expanded educational liberty and opportunity. The outcome of this litigation will greatly affect the ability of states to provide educational opportunities for their citizens, as well as the accessibility of alternative educational outlets for families desiring them. As a result, this case is closely related to the purposes and goals of the organizations presenting this brief.

Mountain States Legal Foundation (MSLF) is a non-profit public interest law center, dedicated to bringing before the courts those issues vital to the individual rights and freedoms protected by the United States Constitution and the nation's legal traditions. The Foundation is supported entirely by the donations of its

members. Because of the interests of its members, many of whom are parents, the Foundation has frequently been involved in litigation dealing with the vitality and autonomy of private sector education. MSLF is deeply concerned with the decline of educational quality in America, and believes that parents should have the maximum possible latitude in providing education of the highest quality for their children. Financial constraints often frustrate the ability of parents to select private schools when it is in their children's interest to do so. The Foundation maintains that it is in the public interest and fully consistent with the First Amendment for the state to lessen those burdens by means of tax credits, deductions, or education vouchers.

The New Coalition for Social and Economic Change is an organization dedicated to the exploration, development, and promotion of alternative solutions to problems facing black Americans, particularly poverty, poor education, and government dependency. The Coalition, working at the community level, seeks ways to exploit the talent, will, creativity, and initiative of black Americans. Expanded educational opportunities are vital to the achievement of these goals. As a result, the Coalition strongly advocates tax credits to help make such opportunities more accessible.

The National Taxpayers Union (NTU) is a non-profit membership organization which promotes the interests of American taxpayers. In the interest of the most efficient and responsible use of taxpayer dollars, NTU has long been active in the drafting of and development of public support for education tax credits. The outcome of this case will affect NTU's ability to effectively and creatively serve the interests of its members in developing education tax credit programs.

The American Association of Presidents of Independent Colleges and Universities (AAPICU) is an association comprised of

192 presidents of private institutions of higher learning. Recognizing that privately controlled colleges and universities are on the frontiers of knowledge and are fundamental to the development of innovative leadership, AAPICU is dedicated to the survival and advancement of a dual system of higher education. To enable private sector education to continue to thrive, AAPICU supports the expanded ability of families to patronize private education through the use of tax credits.

The Education Voucher Institute (EVI) is a non-partisan, non-profit organization whose purpose is to generate, coordinate, and disseminate research on the pros and cons of free market concepts in educational settings. The primary mission of EVI is to promote and conduct research into those conditions under which increased parental choice in education is feasible — that is, the conditions under which choice as well as equal opportunity can be mutually reinforced — and to circulate information about potential ways of expanding available choice.

The thrust of amici's concern is two-fold: (1) that courts, in analyzing potential violations of the Establishment Clause, have failed to consider important state and familial interests served by education tax relief; and (2) that courts have failed to recognize that the primary effect of such relief is not the advancement of religion, but the expansion of educational choice and opportunity.

Amici urge this Court to re-emphasize its dedication to enabling states to provide for the educational needs of their citizens in a flexible manner by upholding the Minnesota statute. Failure to do so could paralyze the ability of parents to pursue quality education for their children, a result which the Establishment Clause certainly does not mandate.

STATEMENT OF THE CASE

This case deals with the constitutionality of Minnesota Statute § 290.09(22) (1978). This statute authorizes a state income tax deduction for expenses incurred in public or private schools. The deduction is limited to $500 per student in grades kindergarten through six, and $700 for each in grades seven through twelve. Expenses must be documented, and the program operates as a true deduction rather than a subsidy, because a tax benefit accrues only if the deduction decreases net taxable income so as to place the taxpayer in a lower tax bracket.

The statute was sustained in its entirety by the trial court in *Mueller v. Allen*, 514 F. Supp. 998 (D. Minn. 1981). The Eighth Circuit affirmed the trial court's opinion at 676 F.2d 1195 (8th Cir. 1982).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents issues of vital national importance which will have a tremendous impact on the future of private educational alternatives and the ability of individuals to pursue them. In this brief, *amici* urge this Court to consider the available factual data which demonstrates the secular purposes and effects of private school education and to re-emphasize its commitment to legal guidelines which recognize the importance to society of these secular purposes and effects.

Amici present substantial statistical data that calls into question conventional wisdom surrounding the nature and impact of private education. Private schools, despite substantial religious support, provide chiefly secular education and have little influence on the religious attributes of students. Financial support by religious organizations makes high quality alternative education

available to many who would otherwise be at a serious educational disadvantage. Far from merely providing exclusive education to the wealthy, such schools often offer the sole opportunity for good education, a safe and stable learning environment, and upward social mobility for the economically disadvantaged. To the extent that states decrease the financial burdens involved in pursuing private educational alternatives, the primary effect of such efforts will be expanded educational choice and opportunity.

The trial court in *Mueller v. Allen* recognized the primarily secular purposes and effects of the Minnesota tax deduction statute. Despite the outcome in that case, with which *amici* strongly agree, *amici* remain concerned that the legal analysis employed to test the constitutionality of the statute could have serious adverse implications for future decisions. By applying the standards articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as a rigid test rather than as the flexible guidelines for identifying potential Establishment Clause violations for which they were intended, *amici* believe that the courts below have precluded consideration of the extremely important state and familial interests involved.

Amici therefore urge this Court to affirm the decision below while reiterating its commitment to a flexible approach to Establishment Clause analysis. A reversal of the decisions below would surely thwart the ability of states to find proper means of helping private education to survive, a result not required by the First Amendment, and wholly contrary to the public interest. *See Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part).

ARGUMENT

I. THE ESTABLISHMENT CLAUSE IS NOT AUTOMATICALLY VIOLATED BY STATE ATTEMPTS TO MAKE PRIVATE EDUCATION MORE ACCESSIBLE.

The First Amendment addresses religion in two ways: the Free Exercise Clause guarantees religious liberty, and the Establishment Clause prevents the state from advancing religion. The Supreme Court has consistently recognized a tension between these two clauses, since an overly zealous safeguarding of the rights guaranteed by one could result in an impairment of those protected by the other. As a result, the Court has attempted to chart a neutral course between the two clauses, drawing a flexible line in the recognition that "rigidity could well defeat the basic purpose of [these clauses], which is to ensure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

In virtually all First Amendment cases, methods have been established to determine whether the magnitude of the injury to constitutional rights is justified by the interests sought to be furthered by the incursion. Thus, in *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court weighed the state's interest in its license plate motto against the plaintiff's First Amendment rights. Similarly, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court considered both the state interest in compulsory secondary education and the free exercise rights of Amish parents.

As in other First Amendment contexts, the Court has provided standards for assessing Establishment Clause violations. The Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), articulated three basic guidelines developed from a long line of cases. In order to avoid impairing the Establishment Clause, a statute must (1) possess a valid secular purpose, (2) have the primary effect of neither advancing nor inhibiting religion, and (3) not foster an

excessive entanglement with religion. *Id.* at 612-13. In *Tilton v. Richardson*, 403 U.S. 672 (1971), decided the same day, the Court applied the *Lemon* guidelines in sustaining construction grants for post-secondary schools. The Court there emphasized that the *Lemon* standards should not be viewed as " 'tests' in any limiting sense of that term, but rather as guidelines with which to identify instances in which objectives of the Religion Clauses have been impaired." *Id.* at 678. In *Lemon*, the Court cautioned further that it was not suggesting "a legalistic minuet in which precise rules and forms must govern . . ., the observance of which is itself the substantive end." *Lemon*, 403 U.S. at 614.

Despite the Court's well-founded concerns that a rigid application of the *Lemon* guidelines could frustrate the purposes of the Religion Clauses, the guidelines have been inflexibly applied in a litmus test manner in cases dealing with education tax benefits. Instead of utilizing the guidelines as the starting point of constitutional analysis for which they were designed, they have been applied as ends in themselves. The guidelines have been molded into a strict test with three "prongs," the violation of any of which requires invalidation of the statute, regardless of any important interests served.

The district court in the instant case adopted this strict analysis and interpreted *Lemon* to mandate that "failure to satisfy any one of the three elements of the test requires a declaration of unconstitutionality." *Mueller*, 514 F. Supp. at 1001. Only a finding of facial neutrality and a non-religious primary effect saved the Minnesota statute. *Id.* at 1003. This test was also applied on appeal. *Mueller*, 676 F.2d at 1198. The *Lemon* "primary effect" standard was carried to an absolute extreme in *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1981). The First Circuit there stated that "it is sufficient

that the plaintiffs show that a primary effect of the tuition deduction is to confer a special benefit on the parents who choose to send their children to sectarian institutions. The law carries the rest of the plaintiffs' burden. . . ." *Id.* at 858.

This rigid application of the *Lemon* guidelines completely ignores the compelling countervailing interests of the state and families. States, for example, have a "paramount responsibility" to provide educational opportunities in a comprehensive manner. *Yoder*, 406 U.S. at 213; *Cochran v. Louisiana State Board of Equalization*, 281 U.S. 374, 375 (1930). They have an interest in fostering educational competition and alternatives of the highest quality. *Board of Education v. Allen*, 392 U.S. 236, 247 (1968). Further, private schools save taxpayers tremendous sums of money, a benefit which would be lost if private schools were abandoned in favor of public schools. *Lemon*, 403 U.S. at 625. Accessible private schools also further the state interest in providing safe, effective, and varied educational environments. *Mueller*, 514 F. Supp. at 1001. Parents, meanwhile, have the primary role in the upbringing of their children and have the right to provide quality education in the private sector. *Yoder*, 406 U.S. at 232; *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).[1]

At present, without tax benefits to help them, few parents can choose secular private schools. Religious institutions are presently the only organizations capable of providing affordable, quality educational alternatives for large numbers of students, given their ability to subsidize part of the cost of such education. *See* A. Greeley, *Catholic High Schools and Minority Students* 96

[1] The case presently before the Court may be a case in which zealous protection of Establishment Clause interests may violate the free exercise rights of parents, as well as the right to pursue private educational alternatives as provided in *Pierce*. Those parents who would prefer private educational alternatives are undoubtedly hindered by the portion of their tax burdens which support public education. To the extent that the state eases this burden and promotes free choice, it would seem to further the neutral course required by the First Amendment.

(1982) [hereinafter Greeley]. Secular private education can grow only if states are able to reduce the financial burdens of obtaining it.

The Minnesota statute challenged in this case is carefully drafted to be neutral on its face and as applied. If the statute is stricken by this Court, the only basis can be the reasoning set forth by the First Circuit in *Norberg*. Logically applied, the *Norberg* holding would require only a *prima facie* showing that some money was passing in indirect fashion from the state to parents to educational institutions sponsored by religious organizations. Such a rigid application of the *Lemon* standards fails to consider important secular governmental and parental objectives, the indirectness of the nexus between state and religion, the actual rather than speculative effect and outcomes of the statute, and possible implications for the free exercise of religion. As a result, it distorts the purpose of the *Lemon* guidelines and endangers the carefully crafted neutrality charted in the Religion Clauses. *Amici* urge this Court to repudiate the *Norberg* holding and sustain the Minnesota statute, thereby confirming the importance of educational liberty and the ability of states to promote it, within the permissible confines of the First Amendment.

II. THE PRIMARY EFFECT OF EDUCATIONAL TAX RELIEF IS EXPANDED EDUCATIONAL CHOICE AND OPPORTUNITY.

A common but erroneous conception often expressed in discussion of education tax relief programs is that the inevitable and primary result will be the advancement of religion. Such a conclusion jeopardizes bonafide state efforts to broaden educational opportunities for the citizenry. *See, e.g., Norberg*, 630 F.2d at 858. Such arguments, however, ignore the fact that institutions receiving consumer dollars in such situations, including those supported by religious bodies, are *schools*, chiefly engaged in the business of secular education. As a substantial body of current

research reveals, the primary effect of widened access to educational alternatives is not the advancement of religion, but enhancement of educational choice and opportunity.

A. *Important differences between public and non-public education provide a non-religious basis for parental selection of private schools.*

Private schools at the primary and secondary levels play an important role in American education. Enrollment in private schools totals 5.1 million students, or 11% of all school children.[2] Private school enrollment has held steady in recent years, with substantial increases in the enrollment of ethnic minority students. Public school enrollment, meanwhile, has declined 14% over the last twenty years.[3] Catholic schools represent almost one-third of all private schools, enrolling two-thirds of all non-public students, while another third of such schools are non-religious.[4] The reason for the predominance of Catholic parochial schools is simple: given financial burdens facing parents, churches are virtually the only organizations capable of providing alternative educational sources affordable to large numbers of families. The Catholic Church, for example, subsidizes approximately 10% of the tuition costs in schools it supports.[5]

It is clear that religion is only one factor motivating parents to choose private schools, and it is rarely the chief factor. The overwhelming majority select such schools primarily because of the academic opportunities available for their children, rather than

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[2] J. Rosenblatt and H. Gimlin, *Education Tax Credits*, 2 Editorial Research Rep. 595, 596 (1981) [hereinafter Rosenblatt and Gimlin].

[3] *Id.* at 596.

[4] J. Coleman, T. Hoffer, and S. Kilgore, *Public and Private Schools* 29 (1981) [hereinafter Coleman].

[5] Greeley at 96.

for religious purposes.[6] Further, private schools heavily stress basic secular academic subjects. This is borne out by the fact that private high school students typically take 23 academic classes as opposed to only 20 taken by the average public school student.[7] Additionally, a far greater percentage of private school students complete advanced academic subjects, such as calculus, physics, and third-year language courses, than their public school counterparts.[8]

The dominant emphasis of non-public schools on academic teaching is also reflected by the tremendous impact that such schools have on students' academic achievement as opposed to the apparently negligible impact on religiosity of the students. Parochial schools appear to affect students' religious attributes only moderately. Slightly more than half of parochial students attend services once a week, and fewer than 15% consider themselves "very religious." These figures are remarkably similar to those for public school students. *See* Appendix, Table 1. The impact of such schools on academic success, however, can be substantial. Private school students score well above the national average in every academic sector: reading, vocabulary, mathematics, science, civics, and writing;[9] and far more aspire to and actually do attend college.[10] As Prof. James Coleman concluded in his recent comparative study of private and public schools, "[w]hen family

[6] J. Cibulka, T. O'Brien, and D. Zewe, *Inner-City Private Elementary Schools: A Study* 73 (1982) [hereinafter Cibulka].

[7] Coleman at 123. Even making the dubious assumption that the remainder of a parochial student's time is spent in religion classes, he or she is still spending more time in secular academic classes than the average public school student. Notes economist Thomas Sowell, "If some . . . religiously oriented groups are willing to conduct good schools in order to be able to put in a word for their beliefs, that is not unreasonable in a pluralistic society. Indeed, [such schools] are partly carrying out a public responsibility at private expense." T. Sowell, *Black Education: Myths and Tragedies* 249 (1972) [hereinafter Sowell].

[8] Coleman at 127.

[9] *Id.* at 173.

[10] Greeley at 24 and 101.

background factors that predict achievement are controlled, students in... private schools are shown to achieve at a higher level than students in public schools."[11] This is true despite the fact that almost all private schools regularly accept academically weak students. Most who transfer from public schools score lower on standarized tests than indigenous private school students.[12]

Two main factors are notable in producing greater scholastic achievement in private schools — greater academic demands and a more ordered environment. In addition to emphasizing academic basics and advanced courses, private schools require more homework[13] and encourage greater laboratory work, field projects, individual instruction, and writing sk[illegible][14]

The greatest difference between public and private schools is in discipline, a factor which compels many parents to seek out alternative educational environments.[15] Parochial schools, in particular, distinguish themselves by their high attendance rates and tight and effective disciplinary standards. *See* Appendix, Tables 2 and 3. Additionally, far more private than public school students rate discipline in their respective schools as fair and effective,[16] and most parents note an improvement in home behavior since enrolling their children in private schools.[17]

Amici do not suggest that private schools are inherently better than public schools. However, it is clear that substantial differences may exist between the private and public educational sectors, which may greatly influence parental choices and the

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[11] Coleman at xxiv.

[12] Cibulka at 140.

[13] Coleman at 146.

[14] Greeley at 43-44.

[15] Coleman at xxvi and 136.

[16] *Id.* at 140.

[17] Cibulka at 140.

academic success of students. Freedom to make such choices may have important effects upon educational development. To the extent that states elect to widen educational choice by lessening the financial impediments which often preclude such choice, the primary effect of such an effort will be to make educational alternatives more accessible.

B. *Private alternatives have their greatest impact in providing educational opportunities to minority students in urban areas.*

The greatest growth in private sector education has been among members of ethnic minority groups. Historically, private schools, especially parochial schools, were established to serve the needs of a minority population. Today, the minority populations being served in this manner are primarily black and Hispanic children.[18] Particularly in urban centers where public schools have deteriorated and in which discipline problems have proliferated, private schools often offer the single source of real educational opportunity for disadvantaged youngsters.[19]

Private schools organized to serve blacks number over one hundred in New York City alone.[20] In urban private schools, 56% of the students are black and 32% are Hispanic. Despite the fact that 90% of the urban schools are Catholic, over half of their students are Protestant.[21] Indeed, religious differences aside and with all other factors being equal, blacks are more likely than any other ethnic group to enter parochial schools.[22] The families of urban private school children tend to be larger and more likely to

[18] Cibulka at 54.

[19] *See* Sowell, generally; and W. Williams, *Inner City Parents and Freedom of Choice*, Black Education and The Inner City 11 (1981) [hereinafter Williams].

[20] Rosenblatt and Gimlin at 603-04.

[21] Cibulka at 19.

[22] Coleman at 82.

be headed by a single parent than typical American families. Eighty-six percent of them have incomes below the national median. *See* Appendix, Table 4. Despite these disadvantages, they are willing to spend an average $400 per student for elementary education[23] or almost $1,000 for secondary education.[24] The willingness of many parents to make such substantial financial sacrifices, particularly when the alternative is tuition-free public education, underscores their desire to attain quality education in the private sector when necessary for the well-being of their children.

Minority families make these sacrifices for two principal reasons: to stimulate upward social mobility and to provide a safe, positive learning environment for their children. Private education has an enormous impact in decreasing the differences between children of disparate social backgrounds.[25] Minority students in non-public schools are substantially more likely to prepare for a college education than minority students in public schools, and even more will do so than will non-minority private school students.[26] *See* Appendix, Table 5. Due to high disciplinary standards, diversity of school services, and decentralized control in urban private schools, parents can better guide and promote academic achievement.[27]

In meeting the educational needs of their citizens, states must have maximum flexibility. One way to effectively foster educational opportunities, particularly in urban areas, is through tax credits or similar programs. As noted black economist Walter Williams argues, such programs could "give poor people at least some of the powers that higher income people enjoy with respect

[23] Cibulka at 19-20.

[24] Greeley at 104.

[25] Coleman at 279; Greeley at 96.

[26] Greeley at 20-24.

[27] Williams at 9-13.

to education, that is the freedom to choose."[28] *Amici* submit that such freedom will indeed be the primary effect of tax relief legislation.

C. *Statutes reducing the burdens in choosing educational alternatives are important for the continued viability of private education.*

Private educational alternatives are facing difficult times. Despite extraordinary financial sacrifices which many families are willing to make, the ability to pursue private education is still inextricably related to income,[29] making educational alternatives inaccessible to many of those who would be most benefitted by them. Due to a weak economy, many students presently enrolled in private schools are continually faced with the possibility of being forced to leave for financial reasons, despite the best efforts of private and religious organizations to make quality educational alternatives financially affordable. A recent survey, for example, indicates that only 36% of urban private school parents could afford a $15 per month tuition increase. Yet private schools face the prospect of requiring such increases, as financial resources decline, physical plants age and deteriorate, and qualified teachers are difficult to retain at minimal salaries.[30]

With the growing inability of parents to afford private schools, and the limited ability of private institutions to subsidize them, it is painfully obvious that many who desire and would be well-served by private education will be unable to attain it. Taypayers will be forced to pick up the slack via the public school system, which costs twice as much to educate children as private schools.[31] In lessening the financial burdens of parents seeking

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[28] Williams at 13.

[29] Coleman at 85.

[30] Cibulka at 201-205.

[31] Greeley at 103.

such alternatives, states will thereby decrease their own financial burdens. And in so doing, they will promote educational choice and opportunity, with important implications for equal educational opportunity and a well-educated citizenry.

CONCLUSION

Amici submit that the foregoing illustrates the important interests supporting the validity of educational tax benefit statutes. The Minnesota enactment herein provides deductions for parents who elect to use them in their children's best interest. Any such tax relief will benefit religion only indirectly and slightly but will expand educational choice directly and greatly. If this statute is unconstitutional, it is difficult to conceive of any permissible statute with the same or similar intent. *Amici* believe that such a result is not required or contemplated by the Establishment Clause, and is inconsistent with the decisions of this Court. For all of these reasons, *amici* urge this Court to sustain the Minnesota statute and to reaffirm its well-established commitment to educational liberty.

Respectfully submitted,

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APPENDIX

Table 1

RELIGIOUS ATTRIBUTES AND IMPACTS
PUBLIC VS. CATHOLIC SCHOOLS

	White		Black		Hispanic	
	Public	Catholic	Public	Catholic	Public	Catholic
Percent Catholic	30	92	4	50	73	96
Percent "very religious"	10	14	6	12	13	15
Percent who attend church services every week	43	71	50	44	45	53
Percent politically "conservative"	7	7	9	8	10	11
Percent politically "liberal" or "radical"	20	20	20	25	21	10

Source: Greeley at 54.

Table 2

PERCENT OF SCHOOLS IN WHICH
PRINCIPALS RATE CERTAIN DISCIPLINE PROBLEMS
AS SERIOUS OR MODERATELY SERIOUS

	Public	Catholic	Catholic Minority
Student absenteeism	70	9	20
Students cutting class	58	2	2
Physical conflict among students	8	0	0
Physical conflict between students and teachers	7	0	0
Vandalism	33	18	8
Drugs or alcohol	55	28	28
Rape	8	0	5
Weapons	2	0	0
Verbal abuse of teachers	15	2	1

Source: Greeley at 30.

Table 3

PERCENT OF STUDENTS WHO STATE THAT PARTICULAR PROBLEMS OCCUR FREQUENTLY IN THEIR SCHOOLS

	White		Black		Hispanic	
	Public	Catholic	Public	Catholic	Public	Catholic
Students talk back to teachers	42	22	39	33	36	17
Don't obey instructions	26	13	30	17	31	11
Fight with each other	24	9	30	9	25	8
Students attack teacher	17	6	28	11	28	6
Truancy	47	8	43	12	49	12

Source: Greeley at 31.

Table 4

FAMILY INCOME OF URBAN PRIVATE SCHOOL FAMILIES VS. ALL U.S. FAMILIES

Income Levels	Private School Families	All U.S. Families
Under $5,000	15%	9%
$5,000 - $9,999	35	18
10,000 - 14,999	22	19
15,000 - 19,999	14	18
20,000 or more	14	36

Source: Cibulka at 34.

Table 5

COLLEGE ATTENDANCE RATE BY SCHOOL TYPE

(Percent of Last Graduation Class Enrolled in College)

Public	43
Catholic	76
Catholic black	78
Catholic Hispanic	84
Elite private	99
Other private	71

Source: Greeley at 101.

MOTION FILED
DEC 9 1982

No. 82-195

IN THE

Supreme Court of the United States

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Petitioners,

v.

CLYDE ALLEN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF FOR THE NATIONAL COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, THE NATIONAL PARENT TEACHER ASSOCIATION, THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND THE AMERICAN JEWISH CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The National Committee for Public Education and Religious Liberty, The National Parent Teacher Association, The American Federation of Labor and Congress of Industrial Organizations, and The American Jewish Congress, move this Court for leave to file the accompanying brief *amici curiae* in support of petitioner.

INTEREST OF THE *AMICI CURIAE*

The National Committee for Public Education and Religious Liberty is a national coalition of organizations [1]

[1] The constituents of National PEARL are: American Association of School Administrators; American Civil Liberties Union;

sharing the common objectives of preserving religious freedom and separation of church and state in public education. It has participated in numerous cases challenging aid to parochial schools as a party or an *amicus*.

The National Parent Teacher Association is a voluntary organization of parents and teachers formed to promote the well-being of children and the viability of public education. The work of the National PTA is carried on principally through its approximately 29,000 local parent-teacher associations, which have a membership in excess of 6,000,000. The National PTA is committed to maintaining the separation of church and state in public education.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 99 national and international unions having a total membership of approximately 14,000,000 working men and women; hundreds of thousands of those men and women are employed in schools and other educational institutions.[2] The labor movement has long been dedicated both

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ACLU National Capital Area; ACLU of Connecticut; American Ethical Union; American Humanist Association; American Jewish Congress; Americans United for Separation of Church and State; Anti-Defamation League of B'nai B'rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochiaid; National Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Women's Conference; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; and Unitarian Universalist Association.

[2] A majority of these employees are represented by the American Federation of Teachers. In addition, the following AFL-CIO affiliates represent a substantial number of school empolyees: the American Federation of State, County and Municipal Employees;

to advancing the cause of public education in this country and to maintaining the separation of church and state.

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political and economic rights of Jews and to promote the principles of democracy. It is committed to the preservation of the freedoms secured by the First Amendment, and especially the freedoms secured by its Establishment and Free Exercise clauses.[3]

REASONS FOR GRANTING THE MOTION

The *amici curiae* are committed to the viability of the Establishment Clause to the Constitution and the integrity of the American public school system. They file this brief because both are endangered by the decision below.

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the American Federation of School Administrators; the International Union of Operating Engineers; and the Service Employees International Union.

[3] The American Jewish Congress files this brief for itself and on behalf of the following other national organizations of American Jews which share its commitment: American Jewish Committee; Jewish Labor Committee; Union of American Hebrew Congregations; Women's American ORT; Anti-Defamation League of B'nai B'rith and Women's League for Conservative Judaism.

In addition, the American Jewish Congress files the brief on behalf of the following local organizations of American Jews: Jewish Federation of Palm Beach County; Jewish Federation of Greater Des Moines; Jewish Community Relations Council of St. Louis; Jewish Community Relations Council of the Jewish Federation of Southern New Jersey; Jewish Community Council of Metropolitan Detroit; Jewish Federation of Greater Seattle; Jewish Community Federation of Metropolitan New Jersey; Jewish Federation of Greater Kingston, New York; Sarasota Jewish Federation, Florida; Flint Jewish Federation, Michigan; Jewish Community Relations Council of the Youngstown Area Jewish Federation; Indianapolis Jewish Community Relations Council; Jewish Federation of St. Joseph Valley, Inc., Indiana; Jewish Community Relations Council of Dayton; Jewish Community Relations Committee of El Paso; Jewish Community Relations Council of Greater San Jose; Milwaukee Jewish Council; and Jewish Community Relations Council of Greater Philadelphia.

It is the thesis of this brief that, whatever its appearance, the Minnesota "dependent education expense" necessarily constitutes special legislation for parents who do not enroll their children in public school—principally because they want their children to receive a sectarian education.[4] *Amici* respect the right of parents to choose such an education for their children, but they submit that the Minnesota statute unconstitutionally subsidizes that choice in violation of the Establishment Clause.

CONCLUSION

For the foregoing reasons, the motion for leave to file the accompanying brief *amici curiae* should be granted.[5]

Respectfully submitted,

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[4] Nationally, 84% of the students who attend nonpublic schools attend schools that are religiously affiliated. *See* National Center for Educational Statistics, *A Comparison of Selected Characteristics of Private and Public Schools*, at 2, 8 (1982). In several of the cases that have come to this Court—including the instant case, *see* p. 2, *infra*—the percentage has been even higher. *E.g.*, *Sloan v. Lemon*, 413 U.S. 825, 830 (1973) (90%); *Wolman v. Walter*, 433 U.S. 229, 234 (1977) (96%).

[5] Although this motion and the accompanying brief are being filed (by hand) one day after petitioners' brief was filed (by mail), the motion and brief are being filed "within the time allowed for the filing of the brief" of petitioners. Sup. Ct. R. 36.2 Accordingly, the motion and brief are timely. *See also id.* R. 36.3

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-195

VAN D. MUELLER, ET AL.,
Petitioners,

v.

CLYDE ALLEN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE NATIONAL COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, THE NATIONAL PARENT TEACHER ASSOCIATION, THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND THE AMERICAN JEWISH CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Minnesota, as does every other state, provides a system of public education at taxpayer expense to children of elementary and secondary school age. Minn. Stat. §§ 120.06, 120.72. In addition to this system of public schools, there are in Minnesota over 500 schools which are

privately supported. More than 90% of these nonpublic schools are sectarian. During the 1979-80 school year, there were 90,954 students enrolled in nonpublic schools in Minnesota; over 96% of these students were enrolled in sectarian schools (JA 32-33).

Minn. Stat. § 209.02(22) authorizes a taxpayer who incurs certain expenses in sending a child to an elementary or secondary school to deduct those expenses, up to specified maxima, from adjusted gross income in computing his or her state income tax. Three categories of expenses are deductible: (1) tuition; (2) textbooks (defined to "include books and other instructional materials and equipment"); and (3) transportation (defined to include transportation for field trips and to and from school).

The State estimates that in 1980, 86,180 taxpayers took advantage of this deduction, reducing their gross income by approximately $32,000,000. The State forfeited roughly $4,100,000 in revenue as a result.[1]

The constitutionality of a law of this type presents no novel issues to this Court. In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and a line of subsequent decisions, this Court has invalidated a variety of similar laws. The teaching of *Nyquist* (and its progeny) is clear: laws which provide special benefits primarily to sectarian school parents—and hence to sectarian schools—and which are not restricted so as to aid only the secular activities of such schools violate the Establishment Clause (pp. 5-7, *infra*).

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[1] These estimates are contained in Minnesota Department of Revenue, Individual Income Tax Sample at 94 (July, 1982). This is a public report of an analysis done by the Department of Revenue on a sample of 20,351 tax returns. *See also Washington Post*, May 1, 1982 at A-3.

In 1980, when the record in this case was compiled, the State estimated that it was forfeiting $2,500,000 in revenue annually as a result of the deduction. (JA-5).

This principle is dispositive here. Like the law struck down in *Nyquist*, the Minnesota deduction for "tuition," which we analyze in Part A, and for "textbooks," which we analyze in Part B, provide a special and unrestricted benefit to sectarian schools since those deductions apply principally to expenses that are not for secular items and that are unique to nonpublic schools. The same is true with respect to the deduction for "transportation" insofar as it applies to transportation for field trips although not insofar as it applies to transportation to and from school (Part C). Thus, the tuition and textbook deduction, and at least part of the transportation deduction, provided for by the Minnesota law should be struck down as "respecting an establishment of religion." [2]

ARGUMENT

"The controlling constitutional standards" for determining whether a law violates the Establishment Clause are by now "firmly rooted," *Committee for Public Education v. Nyquist*, 413 U.S. 756, 761 (1973). Over a decade ago, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court set forth a three-part test for making such determinations:

> First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster "an excessive government entanglement with religion." [*Id.* at 612-13; citations omitted]

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[2] "[The authors] of the First Amendment did not simply prohibit the establishment of a state church or a state religion. . . . Instead they commanded that there should be 'no law *respecting* an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization . . . A given law might not *establish* a state religion but nevertheless be a law 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."

Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis in original)

In a line of subsequent cases this Court has applied the *Lemon* test to invalidate a variety of schemes designed to provide financial relief for parents who choose to send their children to private schools.[3] The seminal case in this line is *Committee for Public Education v. Nyquist, supra,* which particularizes the *Lemon* test for application to the law involved here.

Nyquist involved a challenge to a New York law which created a two-part program of assistance for parents of children attending nonpublic schools. For low-income parents (those with incomes under $5,000), the law provided a cash reimbursement for a percentage of the parent's expenditure for nonpublic school tuition up to certain maxima. 413 U.S. at 764. For middle-income parents (those with incomes under $25,000), the law authorized a state income tax deduction, in a statutorily-prescribed amount, for children for whom the parent had expended at least $50 for nonpublic school tuition; the permitted deduction varied with the parent's income and was "carefully calculated in advance," *id.* at 766, so as to yield tax benefits of up to $50 per child, the minimum amount the parent was required to have expended on tuition to qualify for the deduction. This Court found both parts of the New York program unconstitutional under *Lemon.*

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[3] *Committee for Public Education v. Nyquist, supra*; (cash reimbursements and tax deductions); *Sloan v. Lemon*, 413 U.S. 825 (1973) (cash reimbursements); *Wolman v. Walter*, 433 U.S. 229 (1977) (in-kind loan of instructional materials); *Wolman v. Essex*, 409 U.S. 808 (1972), *aff'g*, 342 F. Supp. 399 (S.D. Ohio) (cash reimbursement); *Byrne v. Public Funds for Public Schools*, 442 U.S. 907 (1979), *aff'g*, 590 F.2d 514 (3rd Cir.) (tax exemption); *Franchise Tax Board v. United Americans for Public Schools*, 419 U.S. 890 (1974), *aff'g*, No. C-73-0090 (N.D. Cal.) (tax credit); *Grit v. Wolman*, 413 U.S. 901 (1973), *aff'g*, 353 F. Supp. 744 (S.D. Ohio) (same). *See also Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980) (tax deduction).

In analyzing the effect of the New York law, the Court viewed the grants and deductions to be, in substance, direct aid to sectarian schools:

> [I]t is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. . . . [T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions. [*Id.* at 783] [4]

The Court went on to find this "financial support" impermissible under the "effect" branch of the *Lemon* test. The Court emphasized two factors. First, the grants and deductions constituted "[s]pecial tax benefits," *id.* at 793, which were being provided "to a class composed . . . predominantly of religious institutions," *id.* at 794. Second, these "special tax benefits" were not restricted so as to "guarantee[] that the state aid . . . will be used exclusively for secular, neutral, and nonideological purposes," *id.* at 780. Consequently, the grants and deductions "'represent[ed] a charge made upon the state for the purposes of religious education,'" *id.* at 791—a charge which could "have the impermissible effect of advancing the sectarian activities of religious schools," *id.* at 794. The Court added:

> In its attempt to enhance the opportunities of the poor to choose between public and nonpublic educa-

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[4] The Court made the same point in *Sloan v. Lemon*, *supra*:

> The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. [413 U.S. at 832]

> tion, the State has taken a step which can only be regarded as one 'advancing' religion. However great our sympathy for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of 'conscience and discipline,' and notwithstanding the 'high social importance' of the State's purposes, neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted. [*Id.* at 788-89; citations omitted]

The *Nyquist* Court found that the New York law raised a problem of constitutional dimension under the third branch of the *Lemon* test as well. In *Lemon*, the Court had warned that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect," 403 U.S. at 622,[5] and that "[t]he potential for political divisiveness related to religious belief and practice is aggravated . . . by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow," *id.* at 623. The *Nyquist* Court concluded that the New York law "carrie[d] grave potential for entanglement in the broader sense of continuing political strife over aid to religion," 413 U.S. at 794:

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[5] The Court in *Lemon* added:

> The potential divisiveness of such conflict is a threat to the normal political process. To have States or communities divided on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. . . . The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief. [403 U.S. at 622-23; citations omitted]

> The language of the Court [in *Lemon*] applies with peculiar force to the New York statute now before us. . . . [T]hese programs start out at modest levels . . . . But we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases. Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases. In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored. [*Id.* at 796-98; citations omitted]

Nyquist thus teaches that a tax benefit that "flow[s] primarily to the parents of children attending sectarian, nonpublic schools," 413 U.S. at 794, and is not restricted to the secular functions of such schools violates the Establishment Clause. As we proceed to show, this principle, which subsequent to *Nyquist* has been applied by this Court on seven separate occasions to invalidate a variety of plans for channeling state aid to sectarian-school parents,[6] likewise requires the invalidation of Minnesota's

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[6] *See* cases cited n.3, *supra*. In these cases, of course, the state aid, while primarily benefiting sectarian-school parents, was not limited to such parents; rather in each case the aid at least was provided to all nonpublic school parents. And in *Grit v. Wolman*, 413 U.S. 901 (1973), *aff'g*, 353 F. Supp. 744 (S.D. Ohio), the Ohio law held unconstitutional provided a tax credit to all parents, "who expend money in excess of that spent generally by public school parents for specialized services such as remedial training adult education," 353 F. Supp. at 759-60.

tax deduction for tuition and textbooks and at least the partial invalidation of the deduction for transportation.

A. The Deduction for "Tuition"

The initial—and by far the most significant—item of deduction authorized by Minn. Stat. § 290.09(22) is for tuition. With regard to this deduction, the similarities between the Minnesota law and the legislation invalidated in *Nyquist* are manifest. Here, as in *Nyquist*, it is "precisely the function" of the Minnesota tuition tax deduction "to provide assistance to private schools" by "assur[ing] that [parents] continue to have the option to send their children" to such schools (p. 5, *supra*); indeed, the State acknowledges that this is its aim.[7] Here, as in *Nyquist*, the "great majority" of private schools aided by the deduction are sectarian; the record establishes that over 90%

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[7] In both the district court and the court of appeals, the State argued that the tuition tax deduction advanced its purpose of "assist[ing] Minnesota taxpayers in providing dependents with a safe, effective and varied educational environment" (*see* Pet. App. A-7 (district court's statement of the State's argument); Pet. App. A-70 (appellate court's statement of State's argument)).

The Minnesota Supreme Court has found this same aim to underly other measures the State has adopted during the past decade. In *Minnesota Civil Liberties Union v. State*, 224 N.W.2d 344 (Minn. 1974) *cert. denied*, 421 U.S. 998 (1975), the court explained as follows the aim of a tuition tax credit law it held invalid:

> The 1971 session of the Minnesota Legislature addressed itself to the problem of the financial plight of the parents exercising their constitutional right to send their children to nonpublic schools. It sought a means to reduce their burden to promote the state interest in maintaining such plurality of educational opportunity and to prevent the demise of such nonpublic schools, with the substantial burden being immediately cast upon the taxpayers of the state. [*Id.* at 345]

See also Americans United Incorporated v. Independent School District No. 622, 179 N.W.2d 146, 154 (Minn. 1970) (Minnesota statute authorizing the loan of textbooks to nonpublic schools intended "to grant some economic relief to those who attend parochial schools").

of the nonpublic schools in Minnesota are sectarian, and that over 96% of the students enrolled in nonpublic schools are enrolled in sectarian schools (p. 2, *supra*). And here, as in *Nyquist*, the deduction is not "restricted" to assure that only the secular activities of sectarian schools are supported.

Despite the similarities between the instant law and the *Nyquist* law in these critical respects, the court below nonetheless thought *Nyquist* distinguishable. Because the New York law authorized a deduction only for *nonpublic* school tuition whereas the Minnesota law is not so restricted, the appellate court concluded that the Minnesota statute is "neutral on its face," has not "singled out a class of citizens for a special economic benefit," and provides "substantial benefits . . . to all members of the public" (Pet. App. A-44 to A-45, A-52).[8] The attempted distinction cannot withstand analysis.

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[8] The court of appeals suggested a second distinction of *Nyquist*: "the statute in *Nyquist* operated as a tax credit," Pet. App. A-41, whereas the Minnesota statute provides a "true deduction," *id.*, whose benefit "is more diffused and less certain" since "whether a parent obtains a tax benefit depends upon whether the deduction is sufficient to move the taxpayer from a higher tax bracket to a lower one," *id.* at A-47. This distinction is doubly flawed.

First, and most fundamentally, the Court in *Nyquist*, in finding that the effect of the New York law was to advance religion and that the law posed a risk of continuing strife along religious lines, did not in any way rely on the fact that under the New York law, the "deduction" was in a statutorily prescribed amount (rather than for the expenses actually incurred by the parents). Indeed, the *Nyquist* Court expressly refused to be drawn into the dispute the parties had waged over labeling the New York law, explaining that "the constitutionality of this hybrid benefit does not turn in any event on the label we accord it. . . . [C]onstitutional analysis is not a 'legalistic minuet in which precise rules and forms must govern.'" 413 U.S. at 789-90, *quoting Lemon v. Kurtzman*, *supra*, 403 U.S. at 614. The Court in *Nyquist* focused on the substance of the New York law, and found that since, in substance, the tax reduction "represents a charge made upon the state for the purpose of religious education," 413 U.S. at 791, it was unconstitutional. Thus,

To begin with, the court below's reliance on the facial neutrality of the Minnesota statute is misplaced. The fact that a statute may be neutral as between parents of public school and nonpublic school children is irrelevant for purposes of Establishment Clause analysis; under that Clause, the determinative question is whether there is neutrality as between religion and non-religion. And that question cannot be resolved simply by examining a statute on its face. The *Lemon* test is not necessary to establish that a law which, by its terms, advantages religion over non-religion is unconstitutional. The test exists principally to judge laws—such as the law considered in *Nyquist*—which, on their face, are neutral between religion and non-religion, but which nonetheless may have an unconstitutional purpose or effect. *Cf. Larson v. Valente*, 50 U.S.L.W. 4411, 4417 (U.S. 1982). In short, the facial neutrality of the tuition deduction in the Minnesota law does not establish its constitutional validity.

When the *effect* of the Minnesota tuition deduction is examined, it becomes readily apparent that the "neutrality" of the deduction is not even skin-deep. At the

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the fact that Minnesota has enacted a true tax deduction, rather than a hybrid, provides no principled basis for distinguishing *Nyquist*.

Second, even if *arguendo* the certainty with which a law provides a sectarian benefit were of constitutional significance, the Minnesota law would not be saved, for the benefit of the Minnesota deduction is not nearly so uncertain as the court below suggested. Minnesota has a progressive state income tax. Minn. Stat. § 290.06(2c). Taxpayers with adjusted gross incomes under $20,000 determine their taxes by use of a tax table; the table divides adjusted gross income into $50 "steps," so that the tax owed decreases for every $50 that adjusted gross income is reduced. Thus, a taxpayer with an adjusted gross income under $20,000 who claims the tuition deduction is guaranteed to realize a tax benefit so long as the deduction is for $50 or more. And taxpayers with adjusted gross incomes over $20,000 will realize a tax benefit from any tuition deduction they claim, since taxpayers in these income brackets cannot use a tax table to determine their taxes but rather pay a percentage of their adjusted gross income in taxes.

time the Minnesota statute was amended in 1976 to raise the maximum deductions, the Minnesota Department of Revenue prepared a "Revenue Analysis." Based upon its twenty years of experience in administering the deduction, the Department stated: "Only those taxpayers having dependents in nonpublic elementary or secondary schools are affected by this law since tuition . . . expenses for public school students are paid for by the school district."[9] Subject to *de minimis* exceptions discussed below (pp. 12-14 & n.10, *infra*), that statement is undeniably true.

The public school system in Minnesota makes education at public expense neutrally available to all school-age children. By law, "[a]dmission to a public school is free to any person [of school age] who resides within the district," Minn. Stat. § 120.06.[10] Thus, the only parents who pay tuition in its ordinary sense, *i.e.* a fee to enable a child to attend school, are those who elect not to avail themselves of this system of public education—principally those who desire a sectarian education for their children. Consequently, as in *Nyquist*, the tuition deduction necessarily provides a special benefit to these

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[9] The 1976 Revenue Analysis is reprinted as Appendix A. An earlier Revenue Analysis, prepared in 1975 when the bill was pending before the legislature, contains the same statement.

[10] If a student attends a public school outside of the district in which he resides, tuition may be charged. Under Minnesota law, the district in which the student resides is authorized (and in certain circumstances obligated) to pay the tuition, *see* Minn. Stat. § 120.08, but there may be situations in which the parent pays the tuition.

The record reveals that in 1977-78, only 40 students attended public schools within the State of Minnesota but outside of the district in which they resided and in 1978-79, only 79 students did so (JA 34-35); the record does not indicate for how many of these students tuition was charged and *a fortiori* does not indicate to what extent, if any, tuition was paid by the parents rather than by the home district.

parents; indeed, that is its very purpose.[11] For this reason, the deduction cannot be sustained, as other benefits have been, on the ground that the deduction is a " 'public benefit[] that [is] 'neutrally available to all,' " *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 746 (1976).[12]

In light of the above, the question becomes whether the tuition deduction can be upheld despite the fact that it provides a special advantage to sectarian-school parents. The court below placed great weight on the fact that subsequent to the preparation of the Revenue Analysis referred to previously, the Minnesota Department of Revnue has interpreted the term tuition to include not only "tuition in the ordinary sense"—which only nonpublic school students pay—but also four *other* fees which are separate from, and in addition to, tuition in the ordi-

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[11] If the State wished simply to reduce the tax burden of all parents of school-age children it could do so without a tuition deduction by, e.g., increasing the exemption for school-age dependents. Such an across-the-board exemption would be "neutrally available to all" and would not be unconstitutional simply because sectarian school parents would benefit from it.

[12] *See also e.g., Widmar v. Vincent*, 50 U.S.L.W. 4062, 4065 (U.S. 1981) ("The provision of benefits to [a] broad . . . spectrum of groups is an important index of secular effect"); *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970) (upholding exemption of religious institutions from property tax as part of exemption extended to "a broad class of property owned by nonprofit, quasi-public corporations"); *Americans United for Separation of Church and State v. Blanton*, 434 U.S. 803 (1977), *aff'g*, 433 F. Supp. 97 (M.D. Tenn.) (upholding law providing scholarship to needy students to attend college or university of their choice, including a sectarian college). *See also Meek v. Pittinger*, 421 U.S. 349, 364 (1975) (dictum) ("as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches and public health facilities—secular and nonideological services"); *Lemon v. Kurtzman*, *supra*, 403 U.S. at 616; *Tilton v. Richardson*, 403 U.S. 672, 687 (1971).

nary sense: (i) fees for necessary remedial instruction;[13] (ii) fees for in-home instruction provided by a school to a handicapped child; (iii) fees for private instruction if the instruction is acceptable for academic credit by a public or private elementary or secondary school; and (iv) fees for driver education when offered for academic credit by a secondary school.[14] As we show, the deductibility of these four fees cannot save the tuition deduction.

Neither the court below (nor the district court) took note that under the Minnesota Education Code, public schools are precluded from charging for the first two

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[13] The lower courts found (Pet. App. A-5 to A-6, A-62 to A-63) that "tuition" includes "[c]ertain summer school tuition" and "[t]uition charged by a school for slow-learner private tutoring services." These findings are based upon a Minnesota Department of Revenue Office Memorandum, which is in the record (JA 21, 22), and which states that "Summer school to keep up with classmates" is deductible and that "private tutoring for slow learners to keep up with classmates" is deductible "if tuition [is] charged by the school."

[14] The lower courts (Pet. App. A-5 to A-6, A-62 to A-64) listed two other categories of deductible expenses under the "tuition" rubric: "Montessori School tuition for grades K through 12" and "tuition [paid by] public school students who attend public school outside their residence school district." These expenses are simply forms of "tuition in the ordinary sense" charged by particular types of schools; the inclusion of these expenses as deductible does not alter the fact that the overwhelming majority of parents paying "tuition in the ordinary sense" are sectarian-school parents. *See also* n.10, *supra*.

In *Grit v. Wolman*, *supra*, the Ohio statute provided credits for parents paying nonresident public school tuition, nonpublic school tuition (including Montessori school tuition), and other forms of tuition as well. *See* n.6, *supra*. Notwithstanding that fact, this Court summarily affirmed the three-judge court's decision holding the law unconstitutional. Significantly, although the three Justices who dissented in *Nyquist* stated in *Grit* that they would have reversed the decision below for the reasons expressed in their *Nyquist* dissent, no member of the Court suggested that the inclusion of a broader class of recipients of tax credits provided a basis for distinguishing *Nyquist*.

items, remedial instruction and in-home instruction for the handicapped,[15] so that these deductions actually represent additional, special benefits for sectarian schools. Thus, the only benefit that the tuition deduction makes "neutrally available to all members of the public" is a deduction for the cost of private instruction where the private instruction qualifies for academic credit, and the cost of driver education, when offered on a fee basis for academic credit, by a secondary school. Two separate lines of analysis show that the inclusion of these two fees in the tuition deduction provision does not save that provision.

(a) The Establishment Clause, as *Nyquist* teaches (p. 7 *supra*), prohibits states from providing special and unrestricted benefits to sectarian institutions. That prohibition cannot be circumvented by the simple expedient of grouping together such a benefit with *other* benefits that are neutrally available to all (or that are limited to non-sectarian institutions). To assure the integrity of the Establishment Clause, each benefit must be separately analyzed under the *Lemon* test, as this Court repeatedly has done, and each benefit must stand or fall on its in-

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[15] Minn. Stat. § 120.72 permits school boards to charge only for "areas considered extracurricular, noncurricular or supplementary to the requirements for the successful completion of a class or educational program." By special authorizing legislation, fees may be charged for driver education, Minn. Stat. § 171.04(1), and for community education programs offered in the summer, Minn. Laws of 1982, ch. 548 art. 6, § 1. But no special authorizing legislation exists—and hence no fee may be charged—for necessary remedial instruction or for instruction of the handicapped; indeed, with respect to the education of the handicapped, Minnesota law expressly requires that school boards furnish, at public expense, "the special instruction and services which are appropriate to the [handicapped child's] needs," Minn. Stat. § 120.17(3a). *See also* 5 Minn. Code of Agency Rules § 1.0120(A); Rules of the Minnesota Board of Education, EDU § 700.04.

dividual merits.[16] Indeed, were the rule otherwise, the constitutionality of a particular benefit would turn not on the substance of the benefit but on the package in which it is contained. The constitutionality of a benefit thus could vary from case to case depending upon whether it is stated separately or grouped with other benefits.

(b) Even if, *arguendo*, a special and unrestricted benefit to sectarian institutions under some circumstances could survive constitutional scrutiny if combined with other neutral benefits, this certainly could not be the result where, as here, the total package so obviously advantages religion. The "neutral" benefits provided by the Minnesota tuition deduction—a deduction for driver education fees and for private instructional fees (when the driver education or private instruction yields academic credit)—are minimal, and are far outweighed by the special benefit for sectarian institutions—a deduction for tuition in the ordinary sense and for fees charged for in-home instruction and for necessary remedial education.[17]

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[16] For example, in *Wolman v. Walter*, 433 U.S. 229 (1977), this Court upheld large portions of the law at issue there, including the loan of texts to sectarian schools, *id.* at 234-36, the purchase of standardized tests for sectarian schools, *id.* at 238-40, the provision of diagnostic speech, hearing, and psychological services to sectarian-school students, *id.* at 240-43, and the provision of remedial services (off school premises) to sectarian-school students, *id.* at 244-48. Yet notwithstanding the validity of these benefits, the Court separately analyzed—and found unconstitutional—the loan of instructional material to sectarian-school students, *id.* at 248-50, and the provision of transportation for sectarian-school field trips, *id.* at 252-55. *See also Meek v. Pittinger*, 421 U.S. 349 (1975).

[17] The record does not allow a definitive quantification of the relative benefits. But it is clear that sectarian school tuition is costly; the national average is $420 for a sectarian elementary school and $976 for a sectarian high school. U.S. Department of Commerce, Bureau of the Census, *Private School Enrollment, Tuition and Enrollment Trends: October, 1979* at p. 27. In contrast, the total amount received by Minnesota public schools in 1978-79

The illogic of the lower court's reasoning is highlighted by assuming that, instead of forfeiting revenue through a tuition deduction, the State chose to expend revenues for the same purposes by reimbursing nonpublic school parents for their full cost in sending their children to nonpublic schools, *i.e.* for tuition in the ordinary sense and the four deductible fees, and by reimbursing all other parents for the full cost of their items of expense that are deductible as tuition under Minnesota's law, *i.e.*, private instruction and driver education. If, as the court below reasoned, the Minnesota tuition deduction provides benefits neutrally to all, it necessarily would follow that the hypothesized reimbursement arrangement likewise would pass constitutional muster. Yet that result, as *Nyquist* states, would be "wholly at variance with the Establishment Clause." 413 U.S. at 782 n.38.

In sum, the Minnesota deduction for tuition provides a special benefit to sectarian schools which is not restricted to the secular activities of those schools. As in *Nyquist*, that special benefit has the "direct and immediate effect of advancing religion," *id.* at 784 n.39, and "carries grave potential for . . . continuing political strife over aid to religion," *id.* at 794.[18] The tuition

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for a budgetary line item denominated as "tuition"—not all of which is necessarily deductible— was $2.46 per public school student ($2,005,142 total) (JA 36-38).

[18] Indeed, events in Minnesota confirm the wisdom of *Nyquist*'s warning (p. 7, *supra*) that "aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies," thereby exacerbating the potential for continuing political strife. The tax deduction at issue here was first enacted in Minnesota in 1955, *see* Ch. 741, 1955 Minnesota Laws; it provided a deduction for a maximum amount of $200 for each dependent. In 1976, bills were introduced to eliminate the maximum, HF 755 and SF 570. The Senate instead passed a bill to raise the maximum to $1,000 and the House passed a bill to raise it to $600; as a compromise, a law was enacted to raise the maximum to $500 for each elementary school child and $700 for each high school child, Ch. 37, 1976 Laws of Minnesota. In 1981, new

deduction thus violates the Establishment Clause.[19]

B. The Deduction for "Textbooks"

In addition to the tuition deduction, Minn. Stat. § 290.09(22) also permits taxpayers to deduct their expenses in acquiring "textbooks"—defined by the statute to include "books and other instructional materials and equipment"—for their elementary and secondary school children. Since this deduction, like the deduction for tuition, provides a special benefit for sectarian school parents—and hence for sectarian schools—which is not restricted to supporting the schools' secular activities, it also violates the Establishment Clause.

Insofar as the Minnesota deduction applies to textbooks "in the ordinary sense," it provides a benefit exclusively to nonpublic (*i.e.*, sectarian) school parents. Under Minn. Stat. § 120.74(1)(a), public schools are "not authorized to charge fees [for] . . . [t]extbooks [and] workbooks. . . ." Thus, only nonpublic (*i.e.* sectarian) school parents can incur costs for textbooks, and, in turn, benefit from the deduction.

Nor is this benefit restricted to supporting the secular activities of sectarian schools. Minn. Stat. §§ 123.932(1)(b) and 123.933(1) require that textbooks that are "secular, neutral and nonideological" and that "are available and are of benefit to Minnesota public school pupils" "be loaned or provided free" by the public schools to nonpublic

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legislation was introduced to double the maximum, HF 242; the Minnesota House passed an amended version of the bill, raising the maxima to $800 and $1,120. The Minnesota Senate did not act on the bill during the 1981 session.

[19] One final point should be added: If a state were to enact a separate deduction for a type of fee which can be incurred by public and nonpublic school parents alike (such as the driver education fee in Minnesota), such a deduction would likely survive constitutional scrutiny. But Minnesota has *not* enacted a separate deduction for any such fee, and thus no such question is presented here. *See also* n.25 *infra*.

school students. This means that sectarian school parents incur costs for texts—and benefit from this aspect of the textbook deduction—only to the extent their children use texts that are *not* "secular, neutral and nonideological" or are *not* "available . . . to Minnesota public school pupils."

Much the same is true of the deduction insofar as it applies to "instructional materials." The Minnesota Education Code permits public schools to make charges for instructional materials *only* in "areas considered extracurricular, noncurricular, or supplementary to the requirements for the successful completion of a[n] . . . educational program," Minn. Stat. § 120.72.[20] The tax-deduction statute, on the other hand, expressly provides that the cost of instructional materials in precisely these areas (*i.e.*, "materials for . . . extracurricular activities . . .") may *not* be deducted.[21] Consequently, the instructional material component of the Minnesota "textbook" deduction, like the textbook component, does not neutrally benefit public and nonpublic school parents alike.[22]

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[20] Thus public schools are precluded from charging for "art materials," "laboratory supplies," and "[s]upplies necessary for participation in any instructional course," *id.* § 120.74(1)(a), (b).

[21] The Minnesota Department of Revenue has interpreted this to mean that, with respect to instructional materials, "[o]nly the basic minimum required expense can be deducted" (JA 22). Thus, as the district court found (Pet. App. A-64 to A-65), the deduction for instructional materials is available for such items as "home economic materials needed to meet minimum requirements"; "special metal or wood needed to meet minimum requirements of shop classes"; and "supplies needed to meet minimum requirements of art classes."

[22] Indeed, the 1976 Revenue Analysis (p. 11, *supra*) states that the textbook deduction "affect[s] only those parents having nonpublic elementary or secondary schools since . . . textbook expenses for public school students are paid for by the school district."

Subsequent events have proven this to be a slight overstatement. Under Minn. Stat. § 120.73(1)(d), (i) and § 120.73(2),

The special benefit that the instructional materials component of the textbook deduction affords to sectarian schools cannot be justified as aiding only the secular activities of these schools. This Court has made clear that loaning instructional materials to sectarian schools (*Meek v. Pittinger*, 421 U.S. 349, 363-67 (1975)), or to their students (*Wolman v. Walter*, 433 U.S. 229, 248-50 (1977)), even though the materials are "ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity." *Meek*, *supra*, 421 U.S. at 366. Similarly, providing special tax benefits to sectarian school parents who purchase instructional materials has the same impermissible effect.[23]

Accordingly, the textbook deduction, in its entirety, violates the Establishment Clause.

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public school students—like nonpublic school students—may be required to purchase "[p]ersonal physical education and athletic equipment and apparel" and "personal or consumable items including pencils, paper, pens, erasers and notebooks," and public school students may be required to pay a rental fee for "musical instruments owned or rented by the district." The Minnesota Department of Revenue has interpreted the term "textbooks" to include these expenses, and thus in these limited respects public school parents may receive some benefit from the deduction for instructional materials (JA 17-18).

The record indicates that in 1978-79 public schools in Minnesota received $907,204 in fees (JA 36-38). The record does not indicate how much of these fees, if any, would be deductible expenses for the parents that paid them under the definition of "textbooks" contained in the tax deduction law.

[23] Indeed, in *Wolman*, *supra*, the Court expressly stated that a "grant in cash"—which is, in essence, what a deduction is—is no different, for Establishment Clause purposes, from a "grant in kind." 433 U.S. at 251. *See also Committee for Public Education v. Regan*, 444 U.S. 646, 658 (1980).

C. The Deduction for "Transportation"

Minn. Stat. § 290.09(22) also authorizes a deduction for the transportation costs incurred by a parent in connection with a child's elementary or secondary school education. This deduction applies to expenses incurred in connection with field trips if "required" by the school (JA 19), and in transporting children to school.

Insofar as the transportation deduction applies to required field trips, it benefits only nonpublic (*i.e.*, sectarian) school parents, since public schools in Minnesota are "not authorized to charge fees" for "[f]ield trips which are required as part of a basic education program or course." Minn. Stat. § 120.74(1)(c). And that benefit is not limited to the secular activities of sectarian schools. As this Court explained in *Wolman v. Walter*, *supra*, 433 U.S. at 253-54:

> [A]lthough a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful. The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest and stimulating the imagination; and it ends with a discussion of the experience. The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct.

Thus, the deduction for field trip costs violates the Establishment Clause.

The foregoing analysis does not apply to the deduction for transportation in the ordinary sense (*i.e.*, to and from school). In Minnesota public and nonpublic school parents are equally likely to incur such expenses,[24] so that this de-

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[24] Under Minnesota law, a school district is not obligated to provide transportation to and from school, but if it does, it must

duction provides a benefit that is neutrally available to all. And a deduction for ordinary transportation expenses does not aid the sectarian mission of sectarian schools. *Cf. Everson v. Board of Education*, 330 U.S. 1 (1947). It follows that, if the deduction for transportation expenses in the ordinary sense stood alone, under *Everson* it likely would be sustained.

But this deduction does not stand alone; it is coupled with the deduction for field trip expenses and, moreover, is part of a single law which provides two other deductions which, as we have shown, violate the Establishment Clause. The question thus arises whether the deduction for transportation expenses in the ordinary sense is severable.

That question, of course, is one of legislative intent: would the Minnesota legislature "have enacted [the] provision which [is] within its power, independently of [those] which [are] not." *Tilton v. Richardson*, 403 U.S. 672, 684 (1971), *quoting Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 234 (1932). We submit this question is best answered, in the first instance, by the lower courts.[25] Accordingly, if the Court finds the deduction for

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be offered without cost, *id.* § 120.74(1)(j), and the district "shall provide equal transportation within the district for all school children to any school," regardless of whether the school is public or nonpublic. Minn. Stat. § 123.78(1). Thus, transportation expenses will not be incurred by any parent whose child attends a school within the school district in which the parent resides unless the district provides no public transportation, and in that event, expenses will be incurred by public and nonpublic school parents alike.

[25] Although certain aspects of the tuition and textbook deductions are available to public and nonpublic school parents alike (*see* pp. 13-14 & n.22 *supra*), a severability question is *not* posed with regard to those two deductions. The only neutrally available aspects of those deductions are for expenses that fall far from the ordinary meaning of the terms "tuition" and textbooks"—the terms the Minnesota legislature used in enacting the deductions. Moreover, those

transportation in the ordinary sense constitutional under *Everson*, it should remand the case for the limited purpose of determining whether that deduction is severable from the remainder of the law.

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aspects of the tuition and textbook deductions that might pass constitutional muster if enacted separately are relatively insignificant *vis-a-vis* the portions that are unconstitutional. In contrast, the core aspect—and the major expense item—under the transportation deduction (*i.e.*, transportation in the ordinary sense) appears to be constitutional under *Everson*.

While recognizing that severability is a legitimate question here, we in no sense suggest that the Minnesota legislature in fact would have enacted separately the deduction for transportation in the ordinary sense. To the contrary, this deduction is but a small piece of the total dependent education expense deduction and, for essentially this reason, the First Circuit, in *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980), concluded that the counterpart piece in a virtually identical dependent education expense deduction statute would *not* have been enacted separately by the Rhode Island legislature.

We believe the First Circuit's analysis is applicable here as well, and that the question posed in text properly is answered in the negative. Nonetheless, because there is room for doubt on the issue, we believe that the lower courts, who have a better basis for determining what the Minnesota legislature would have done, should answer the issue in the first instance.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it upholds the constitutionality of the Minnesota tax deduction for tuition, textbooks, and transportation for field trips. If the Court finds the deduction for transportation in the ordinary sense constitutional, the case should be remanded for further proceedings with respect to the severability of that component of the transportation deduction.

Respectfully submitted,

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APPENDIX

[SEAL]

STATE OF MINNESOTA
DEPARTMENT OF REVENUE
Centennial Office Building
Saint Paul, Minnesota 55145

DEPARTMENT OF REVENUE
ANALYSIS OF Laws of 1976, Chapter 37

March 15, 1976

Revenue Analysis Summary

The revenue impact resultant from Chapter 37 is an estimated decrease in individual income tax collections of about $1,200,000 in 1976. This law will affect collections in the 1976 fiscal year as it is retroactive and includes the 1975 taxable year.

Bill Explanation

Chapter 37 increases the $200 limitation for the income tax deduction for a dependent's school expenses to $500 for dependents in kindergarten and grades 1-6 and to $700 for dependents in grades 7-12.

It also includes the cost of textbooks in the allowable amount of the deduction for a dependent's school expenses. Only those taxpayers having dependents in non-public elementary or secondary schools are affected by this law since tuition, transportation, and textbook expenses for public school students are paid for by the school district. This chapter, which was signed into law on March 8, 1976, is effective for taxable years commencing after December 31, 1974.

Those taxpayers eligible for increased deductions due to this law who have already filed their 1975 income tax re-

turn will have to file an amended return in order to take advantage of the allowable increase in the deductible amount.

Revenue Analysis Explanation

This estimate is based on prior analyses of versions of bills (S.F. 570, H.F. 675) which were similar to Chapter 37 as enacted. Current nonpublic school enrollment figures were obtained from the Research Section of the Catholic Education Center for the Archdiocise of St. Paul and Minneapolis and were incorporated into this analysis.

Total nonpublic elementary and secondary school enrollment for the 1975-1976 school year is estimated at 93,900. Of this total, 60,600 are kindergarten students or are in grades 1-6 and the remaining 33,300 students are enrolled in grades 7-12. Estimates of the tuition expenses for nonpublic elementary and secondary students have not changed significantly from the 1974-1975 school year. The following table summarizes the estimated revenue loss:

	Elementary (K-6)	Secondary (7-12)
Deductions Under Proposal	$10,856,000	$14,682,000
Deductions Under $200 Limitation	9,454,000	6,088,000
Increase in Deductions	1,402,000	8,594,000
Marginal Tax Rate	10.2%	11.5%
Revenue Loss	$ 143,004	$ 988,310

The total revenue loss is estimated at approximately $1,200,000 in 1976. Increases in tuition over the next few years could result in substantial increases in the cost of the deduction.

SOURCE Minnesota Department of Revenue
Tax Research Division
March 15, 1976

MOTION FILED
FEB 9 1983

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")

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The National Jewish Commission on Law and Public Affairs ("COLPA") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of respondents that the decision below should be affirmed.

Consent to file this brief has been sought from the parties, but counsel for respondents have refused to consent on the ground that it is their policy not to consent to the filing of *amicus* briefs in this case, whether

they be favorable to or contrary to their position. It is therefore necessary to request leave of Court to file the attached brief, pursuant to Rule 42.

COLPA is a voluntary, not-for-profit corporation of attorneys and social scientists of the Jewish faith, dedicated to combatting all forms of religious prejudice and discrimination and representing the position of the Orthodox Jewish community in matters of public affairs. Since its organization in 1966, COLPA has filed *amicus* briefs before this Court in numerous cases involving the Free Exercise and Establishment Clauses of the First Amendment. *See, e.g., Widmar v. Vincent*, 102 S.Ct. 269 (1981); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Commission*, 397 U.S. 664 (1970).

This case is of substantial importance to COLPA and the organizations joining with it in this brief because of their recognition of the importance of a healthy educational system to the welfare of a free society, and their firm belief in the importance of the advancement of educational opportunity for all American school children. We believe that our pluralistic society benefits through legislation designed to grant a small measure of tax relief to those parents of both private and public school children who bear the burden of tuition for their children's education.

COLPA believes that the accompanying brief will be of assistance to the Court because it will give this Court the benefit of COLPA's views based on its extensive experience in the area of the First Amendment.

Respectfully submitted,

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BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief is being submitted by the National Jewish Commission on Law and Public Affairs ("COLPA") on behalf of itself and the following major

national Orthodox Jewish rabbinic, synagogal, educational and social service agencies which represent the broad spectrum of the Orthodox Jewish community in this country:

Agudath Israel of America
National Council of Young Israel
Rabbinical Alliance of America
Rabbinical Council of America
Torah Umesorah, The National Society for Hebrew Day Schools
Union of Orthodox Jewish Congregations of America
Union of Orthodox Rabbis of the United States and Canada

In addition, COLPA files this brief on behalf of the Board of Jewish Education of Greater New York, the educational service agency of the Federation of Jewish Philanthropies of New York.

COLPA is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. COLPA and the organizations joining with it in this brief are deeply committed to the preservation of constitutional rights for all Americans, and in particular to the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty.

The primary and secondary education of our children is a subject of the highest importance to the Orthodox Jewish Community, which is committed to provide for its children the very finest training in both secular and religious fields. Although the Constitution commits the financing of religious education to private support, we believe it to be a proper and

legitimate—indeed, a necessary—function of government to assist *all* citizens of *all* faiths in providing a high-quality secular education for the youth of America. By granting itemized-deduction status in an income-tax structure to a family's expenditures for such education, a State is only recognizing that tuition expenditures serve public policies which are as important as the payment of interest on home mortgages, the payment of medical and hospital expenses, and the payment of contributions to local welfare agencies or churches. It is, we believe, an essential part of the cooperation between government and the private sector to permit itemized deductions to be utilized for the achievement of socially useful objectives such as the education of elementary and secondary-school children. It is unsound constitutional law and policy to invalidate a law that improves the quality of primary and secondary education merely because litigants believe that the statutory mechanism may produce some imprecisely quantifiable financial benefit to the parent of a child attending a sectarian school. The First Amendment is not a directive to search out miniscule flaws in an otherwise sound legislative policy.

ARGUMENT

Minnesota's income-tax structure follows the familiar federal tax model. Minnesota requires taxpayers to report their annual gross incomes and then permits them to deduct items of expense that are recognized by Minnesota law as legitimate offsets against annual income. This produces a taxable income figure. On this basis, Minnesota's income-tax law—like its federal counterpart—permits a taxpayer to deduct interest payments (which frequently make up a substantial part of the mortgage payments for a

taxpayer's personal residence), medical expenses, and charitable contributions. *See* Minn. Stat. Ann. §§ 290.09(3), 290.09(10), 290.21(3). Minnesota also provides itemized deductions for income-tax purposes that are not authorized by federal law, such as payments to cooperative apartment corporations (Minn. Stat. Ann. §290.09(17)), expenses incurred in establishing, maintaining or increasing the circulation of a newspaper or magazine (*id.* §290.09(16)), and expenses incurred in the adoption of one or more children (*id.* §290.09(27)). The issue in this case is whether tuition or other specified education-related payments to a primary or secondary school may constitutionally be given the same status as interest payments, medical expenses, charitable contributions, or other itemized deductions in Minnesota's income-tax scheme.

A single constitutional proposition is, we believe, dispositive of this case: A law which permits taxpayers to deduct private payments to a nondiscriminatorily defined category of recipients as one of a number of itemized deductions for income-tax purposes is too indirect and uncertain a form of assistance to religion to be barred by the Establishment Clause of the First Amendment. This constitutional proposition is supported by decades of common understanding in this country, during which taxpayers and the Congress have consistently assumed that there is no constitutional infirmity in a law that permits private contributions to indisputably religious bodies such as churches to be treated as tax deductions. Direct private aid to churches has been encouraged by the availability of such tax deductions, but no court has ever declared such indirect and imprecisely quantifiable aid to be unconstitutional.

The petitioners' brief, as well as briefs of various

amici supporting the petitioners' position, have tried to portray this case as if it were controlled by this Court's decisions in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977). In fact, this is not a case in which funds are spent from the public treasury for the benefit of private schools, including many which offer sectarian education. It is, rather, a case involving itemized tax deductions, a form of public recognition of the private allocation of resources which has traditionally been accepted in our society, even where the direct and immediate beneficiary is an institution that is totally religious in nature.

This Court repudiated in *Nyquist* the position underlying petitioners' challenge to the Minnesota tax deduction statute when it held (413 U.S. at 790 n. 49) that the program in that case did not involve "a genuine tax deduction, such as for charitable contributions." In so doing, the Court recognized that not all "tax benefits" are constitutionally identical. There are significantly different social policies and consequences to each of various forms of "tax benefits" that a legislature might devise.

Itemized deductions for charitable contributions have been a part of our federal tax structure for many years. On account of this provision, individuals donate significant amounts to churches, synagogues and other religious institutions. The universal acceptance of this form of "tax benefit" to religion is itself cogent proof of its constitutionality. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 675-80 (1970).

If contributions made directly to churches, synagogues or sectarian schools to advance their *religious* activities may be deducted from a taxpayer's gross income in computing his tax without violating

the Establishment Clause, it follows *a fortiori* that individual payments to a sectarian school for the cost of a *secular* education, for *secular* textbooks or for student transportation may surely be deducted, in similar fashion, without running afoul of the Establishment Clause. Each may be a form of public recognition of private financial assistance, but it is surely indisputable that a tax deduction for a contribution to a church aids religion far more immediately and directly than a deduction for a payment for secular services provided to a student in a sectarian school. The fact that the first taxpayer is giving a gift to the church or to the sectarian school while the second is purchasing a service from such an institution surely does not affect the First Amendment issue. Indeed, legislative encouragement of a gift is more of an aid to religion than legislative encouragement of the purchase of services. In the former instance, the religious institution may use the gift to proselytize others; in the latter, it merely provides a benefit to one who is already an adherent.

To be sure, there may be rational legislative reasons to permit a tax deduction for a gift which may not apply to the purchase of a service. But that legislative question—which the Minnesota legislature has resolved in favor of recognizing the deductibility of both expenditures—is not a First Amendment question. It raises neutral issues of fiscal policy. And just as the Minnesota legislature could and did decide that amounts spent in purchasing services needed to augment the circulation of a magazine or to adopt a child may be deducted, it could legitimately conclude that the purchase of services for elementary or secondary education—whether at sectarian or non-sectarian schools—may be encouraged with the recognition of a tax deduction.

Petitioners seek to distinguish charitable contributions deductible under Section 170 of the Internal Revenue Code from the deductions in this case on the ground that only expenditures made "out of 'detached and disinterested generosity' " are given deductible status by Section 170. *See* Brief for Petitioners at 21-25. That characterization is simply wrong. Deductions under Section 170 of the Internal Revenue Code for payments made to secular or to religious institutions have consistently been permitted even where the group of which the contributor is a member receives some substantial benefit from the charity he has given. "Detached and disinterested generosity" is not a prerequisite for a constitutional itemized tax deduction.

In Rev. Rul. 80-77, 1980-1 C.B. 56, for example, the Internal Revenue Service held that contributions (1) to a Red Cross chapter which provided food and temporary shelter to a taxpayer during a tornado, (2) to a local volunteer fire department which is a town's only firefighting agency, (3) to a local Girl Scout unit to which a daughter of the taxpayer belongs, and (4) to a charitable campaign which supports a home for the elderly where the taxpaver's parent resides are all permissible charitable deductions. *See also Wegner v. Lethert,* 67-1 U.S.T.C. ¶ 9229 (D. Minn. 1967) (contribution to Catholic Welfare Association which provided assistance to taxpayer in adopting a child); *Isabel Peters,* 21 T.C. 55 (1953) (contribution to swimming facilities for local residents). By the same token, contributions by members of a local bar association to the maintenance of a law library accessible only to bar association members and their designees is a permissible charitable contribution, even though the contributors—who appear to be the exclusive beneficiaries of the library's facilities—are not acting

out of "detached and disinterested generosity." Rev. Rul. 75-196, 1975-1 C.B. 155. *See also* Rev. Rul. 79-323, 1979-2 C.B. 106 (contribution to industrial commission in a particular area); Rev. Rul. 76-419, 1976-2 C.B. 146 (contribution for industrial parks); Rev. Rul. 71-545, 1971-2 C.B. 235 (contribution for international exposition); Rev. Rul. 70-186, 1970-1 C.B. 128 (contribution for preservation of local lake).

There are ample precedents along the same lines for contributions to organizations dedicated to religious purposes. Rev. Rul. 77-430, 1977-2 C.B. 194, concerned the eligibility for charitable contributions of a non-profit organization conducting weekend religious retreats for Christian denominations at a lakeshore site. Although no fees were charged for use of the facilities, participants were urged to contribute. The Internal Revenue Service concluded that since the facilities are used for religious purposes, contributions from retreat participants are deductible—although it seems clear that their motivations are not entirely "detached and disinterested." Similarly, a nonprofit organization that publishes a monthly church newspaper and carries notices and items of interest to church members qualifies for deductible charitable contributions, even though its contributors may benefit substantially from the publication. Rev. Rul. 68-306, 1968-1 C.B. 257. *See also* Rev. Rul. 71-580, 1971-2 C.B. 235 (nonprofit religious genealogical organization). Indeed, the Internal Revenue Service has recognized that even if a contribution to a church is in direct proportion to the benefits received by the taxpayer from the church—*i.e.*, "pew rents, building fund assessments, and periodic dues"—they are permissible itemized deductions. Rev. Rul. 70-47, 1970-1 C.B. 49.

Tuition payments to churches or church schools are, to be sure, not deductible under Section 170. But that is not because they violate the Establishment Clause more than "pew rents" or "periodic dues." The *only* reason why payments to a church for religious instruction are not deductible under Section 170 is that the United States Congress has made a legislative judgment that when an individual or his family receives a direct personal benefit in exchange for the funds he provides, his payment is not a "contribution" within the meaning of Section 170. That same principle—which is totally devoid of any First Amendment significance—applies to wholly nonsectarian groups such as the Girl Scouts or a volunteer fire department. A payment to either organization is a tax-deductible "contribution" if there is no personal *quid pro quo*, so that any private benefit that may result is regarded as merely incidental to the general public benefit that is served, but it is not a "contribution" if the giver receives a particularized secular service or a tangible product in exchange for his payment.

In this case, the Minnesota legislature has departed from the federal model to provide a tax deduction for tuition for elementary and secondary education—as it has done for payments made in the course of an adoption. That legislative judgment raises no First Amendment question. So long as no direct governmental revenue allocation is involved and the only form of tax benefit is an itemized deduction on an income-tax return, the legislature's decision passes constitutional muster.

We recognize, of course, that the distinction between tax deductions and governmental expenditures "has encountered stormy weather in academic circles in recent years." Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 Tax L.

Rev. 37 (1972), and authorities cited in n. 1. As a matter of academic logic, there may be little economic difference between an expenditure from the public treasury and the allowance of a tax deduction. But when viewed from the vantage point of the First Amendment, which is designed to prevent the power, prestige, and financial support of government from being exploited on behalf of one religion or all religions (*Engel v. Vitale,* 370 U.S. 421, 431 (1962)), there is an obvious difference between a payment from the public treasury and allowance of a tax deduction.

By allowing a tax deduction, the State is not endorsing what the private giver has done. It is merely acknowledging private philanthropy—or some other private expenditure of funds—as a beneficial and socially useful means of allocating private resources. The payment is a private one, and neither the recipient nor any onlooker may view it, at the time it is made, as bearing any State imprimatur. Nor is the precise amount of its ultimate financial value definitely ascertainable. As of the time the payment is made, its consequences may depend on many other factors that may not be known until the end of the year. The taxpayer's "tax bracket," as well as other facts that might bear on the utility of the deduction (such as whether the taxpayer will have net income in that year), may depend on future events. Thus, the ultimate impact of the private payment upon the public treasury is not ascertainable if it is only classed as a permissible itemized deduction.

For these reasons, there is a basic constitutional difference between payments from a public treasury and itemized deductions in an income tax structure. This case involves the latter, which are well-established permissible tax benefits to religious institutions.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals sustaining the challenged Minnesota law should be affirmed.

Respectfully submitted,

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February 2, 1983

MOTION FILED
DEC 9

No. 82-195

IN THE
Supreme Court of the United States
October Term, 1982

VAN D. MUELLER and JUNE NOYES,
Petitioners,

v.

CLYDE E. ALLEN, JR., et al.
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE and AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF
THE NATIONAL SCHOOL BOARDS ASSOCIATON
TO FILE BRIEF AS AMICUS CURIAE

The National School Boards Association moves this Court for leave to participate as amicus curiae herein, for the purpose of filing the attached brief in support of Petitioners. Counsel for Petitioners have consented to the appearance. A copy of the letter of consent is attached.

Respectfully submitted,

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MEMORANDUM OF THE NATIONAL SCHOOL
BOARDS ASSOCIATION IN SUPPORT OF
MOTION FOR LEAVE TO FILE AS AMICUS CURIAE

The National School Boards Association has moved this Court for leave to appear as amicus curiae herein for purpose of filing the attached brief in support of petitioners.

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the decisions rendered by those directly accountable to the public through the elective or appointive process. In its fortieth year, the National School Boards Association is the only major educational organization representating school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

There is a concerted National effort on the part of private schools throughout the country, particularly schools with a religious affiliation, to seek passage in other states of laws such as that which is the subject of this case. Thus, the decision in this case will have a major effect on public schools throughout the country. The National School Boards Association, as the representative of the policy-makers for those school districts, the students in those public schools and their parents, have a vital interest in assuring that the separation of Church and State continues and that public support for education of elementary and secondary age children be reserved for public school children.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public

schools, and to preserve the decisions rendered by those directly accountable to the public through the elective or appointive process. In its fortieth year, the National School Boards Association is the only major educational organization representating school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

There is a concerted National effort on the part of private schools throughout the country, particularly schools with a religious affiliation, to seek passage in other states of laws such as that which is the subject of this case. Thus, the decision in this case will have a major effect on public schools throughout the country. The National School Boards Association, as the representative of the policy-makers for those school districts, the students in those public schools and their

parents, have a vital interest in assuring that the separation of Church and State continues and that public support for education of elementary and secondary age children be reserved for public school children.

ISSUES PRESENTED FOR REVIEW

Amicus incorporates by reference the issues set forth in Petition for Certiorari.

ARGUMENT

I. CASE LAW HISTORY - PUBLIC AID TO PRIVATE SCHOOLS

The case law on the issue of state aid to education and, more specifically, aid for sectarian elementary and secondary schools, is confusing and inconsistent. The Supreme Court finds itself fashioning narrow distinctions. One finds that parochial students can be loaned textbooks, Board of Education v. Allen, 392

U.S. 236 (1968), but cannot be reimbursed for the loan value of books that they purchase. Public Funds for Public Schools of New Jersey v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd, 417 U.S. 961 (1974). Further, students in private sectarian schools can receive textbooks but may not obtain maps and other instructional material to supplement the information found in the textbooks, when such was loaned directly to the schools. Wolman v. Walter, 433 U.S. 229 (1977), Meek v. Pittenger, 421 U.S. 349 (1975).

Reimbursement to parents for the cost of fares for transportation of children attending parochial schools is constitutional, Everson v. Board of Education, 330 U.S. 1 (1947), yet, once at school, the same students may not be provided

with state-funded transportation for field trips. Wolman v. Walter, supra.

> Establishment Clause cases are not easy...[the] decisions have tended to avoid categorical imperatives and absolutist approaches...sacrificing clarity...for flexibility. Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980). (Justice Stevens, in his dissent, contends that this is a understatement and a situation no longer acceptable. Id.).

Prohibition of state aid to religion derives from the First Amendment, which the 14th Amendment makes binding on the states through the Due Process Clause. The language prohibits any law "respecting the establishment of religion." In ruling upon challenges to statutes as violative of the Establishment Clause, the Supreme Court has set three standards as general guidelines. To satisfy the Constitution, a statute "must have a secular legislative purpose, must have as its principal or primary effect neither the advancement nor

inhibition of religion, and must avoid excessive entanglement with religion." See Lemon v. Kurtzman, 493 U.S. 602, 612 (1971). Despite the uncertainty and ambiguity of the case law regarding the specifics of state aid, statutes such as that at issue here would seem unlikely to meet constitutional muster when this three-pronged test is applied.

When broad relief is offered and secular and religious benefits cannot be separated, the Supreme Court has traditionally found that such aid violates the Establishment Clause, regardless of whether the aid is directly or indirectly received by the sectarian school. Thus, in instances where tax relief and tuition reimbursement were offered to parents of children attending non-public elementary and secondary schools, the statutes were struck down by the high court and other federal courts. See Committee for Public Education and Religious

Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 812 (1973); Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980).

In Nyquist, a New York State law was challenged that provided for state income tax benefits and tuition reimbursement grants to parents of children attending New York non-public schools. The Supreme Court held that the aid provisions violated the second standard of the Lemon test in that they had the primary effect of advancing religion. The Court found, too, that the third standard was not met, in that "...if the secular use of all funds was to be assured, an intrusive entanglement between the Church and State would be required." Nyquist, 413 U.S. at 780.

The Court found most troubling the fact that tax relief in the form of tuition grants "were

subject to no restrictions that would guarantee separation between secular and religious functions and ensure that State financial aid supports only the former." Nyquist at 783. The state money then would be subsidizing the religious activities of the sectarian schools -- an impermissible advancement of religion. Nyquist at 773. While the Court recognized that some forms of aid may be channeled to the secular without providing direct aid to the sectarian, such a channel "is a narrow one." Nyquist at 777. Further, "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religion." Early v. DiCenso, 403 U.S. 602 (1971). Cases involving similar tax programs were invalidated on the strength of Nyquist. See, for example, Unified Americans for Public Schools v. Franchise Tax Board of the State of California, No. C-73-0090 (N.D. Cal., filed 2/1/74), aff'd mem., 419 U.S. 890 (1974);

Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972) aff'd mem. sub. nom. Grit v. Wolman, 413 U.S. 901 (1973); Public Funds for Public Schools of New Jersey v. Byrne, 444 F. Supp. 1228 (D.N.J. 1978), aff'd, 590 F. 2d 514 (3d Cir. 1979); Sheldon Jackson College v. State, 599 P. 2d 127 (Alaska 1979).

II. THE MINNESOTA DECISION

Tuition tax deductions or credits at the state level are bad public and educational policy for several reasons:

- o Tuition tax credits and deductions undermine America's traditional system of universal public education.
- o Tuition tax credits and deductions give private schools an unfair competitive advantage over public schools, since private school can refuse to offer services that public schools must provide and because private schools can be more selective with regard to whom they admit.

- o Tuition tax credits and deductions would induce an educational caste system by drawing children from middle and high income families into private schools and leaving the difficult and expensive-to-educate children behind.

- o Tuition tax credits and deductions would erode voter support for local school budgets by attracting to private schools some of the parents most likely to back bond issues and quality programs.

- o The federal and state government's responsibility to the public is to support public schools and leave the private schools alone.

A. THE LOWER COURT OPINION

Neutrality: Secular v. Sectarian

The lower court in this case held constitutional Minnesota Statute §290.09, subdivision 22, which authorizes an income tax deduction for tuition, textbook and transportation expenses incurred on behalf of dependents attending elementary or secondary school.

The court based its decision on a notion that parents of both private and public school students are assisted by the statute and, therefore, the statute is neutral to religion and serves a secular, educational purpose. That argument is utter nonsense. Parents of private school students benefit overwhelmingly from tuition, textbook and instructional material deductions of the parents. Of these parents, the vast majority send their children to religiously affiliated schools.

Over five million students are enrolled across the country in private schools, compared with 40,949,100 students who are enrolled in public schools. There are approximately 21,000 private schools in the U.S., that is, 19.6% of all schools. About 10.9% of all students are enrolled in private schools; 84% of those private school students are in schools with a religious affiliation. National Center for

Educational Statistics, U.S. Department of Education.

The primary source of income for private schools is tuition. Public schools do not charge tuition for the regular school year except in very limited instances where a child attends school outside his district. Such transfers outside the district are also not readily allowed by school districts.

The district court below made a finding that one item of deductible expense included "tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school." 676 F.2d 1196. It should be noted that the Education for All Handicapped Children Act, 20 U.S.C. § 1401(18) requires the state to provide every handicapped child "a free appropriate public education." If a school district does

not have an appropriate school for a physically handicapped child and opts to send the child to a private school, that public school district must pay the tuition. Thus, there would be no tuition for the parents to deduct.

Public schools do not even have the option of charging tuition to obtain funding, even were it deemed good public policy for public schools to do so. It is questionable as to whether tuition charges would be upheld, given the fact that public education is a "right" in every state and the requirement of tuition payment may foreclose the exercise of that right by the poor. Plyler v. Doe, 50 U.S.L.W. 4650 (Dec. 15, 1981).

Public school children are provided textbooks free of charge. Private school children buy their textbooks, and thus parents could deduct that cost. Public school children

may purchase some other outside instructional material but those instances are very limited. If a public school student needs material which his parents cannot afford, it will be provided at no cost. Thus, only the private school parents, in the great bulk of the cases, would have deductible costs for instructional materials.

Parents of public school students pay the expenses for many extracurricular activities but, interestingly, this one area where there may be some public school expenses to deduct is the one area which is excluded by the Minnesota statute.

Yet - it is argued that this statute is distinguishable from the statute in Nyquist because "the tax benefits in Nyquist were limited to the class of parents of private school children, as opposed to the broad class

of parents with dependents in both public and nonpublic school." This distinction is untenable in light of the above. It is also fallacious given the class of parents of handicapped and limited-English speaking children who generally have no choice but to attend public schools, and thus, do not fall within the "broad class" of parents benefited by this statute.

Public schools, as we have mentioned, are required by federal law as well as by public policy, to educate all handicapped children in their districts. The average cost for that education is twice that of the average child. 121 Cong. Rec. 23,705. Yet only 2.7% of all religious schools provide programs for the handicapped, charging them tuition in the process. Public schools, on the other hand, charge no tuition and provide all but a scintilla of the cost of educating the most

expensive children. The National Coalition for Public Education Fact Sheet, 1982.

Public schools, by federal law and public policy, are required to provide educational services to students with little or no English language proficiency. Lau v. Nichols, 414 U.S. 563 (1974). Bilingual and total emmersion programs for these children are very expensive. Although statistics are unavailable, it is unlikely that many private schools are able to serve these children. The parents of these limited-English speaking children, even with a tax incentive, still do not have a choice of where to educate their children. Yet the court below finds that the statute aids parents of both public and private students.

The lower court decision dwelt at some length on the second and third part of the 3-prong Lemon test, supra, in determining

whether the state is violating the First Amendment. However, the first prong is equally important and in this case may be even more important. That test is whether there is a "secular legislative purpose" for the statute. Although the Minnesota legislature engaged in various ploys to disguise its true intent, in order to assure that the statute passes Constitutional muster, there is little question that the sole motivation behind the law was to assist religious education.

The driving force for the Minnesota statute, as well as similar legislative proposals at both federal and state levels, has been the Catholic schools. Breneman, "Tuition Tax Credits: Where Would They Take Us? Should We Agree to Go?", Brookings Institution, 1981. Although framed in terms of "providing educational alternatives", it can be assumed that the real reason for the push for tax incentives for private schools is

to provide the alternative of religious education, not just education at the private level.

The rational for such tax incentive proposals is very clearly stated in a recent editorial in Momentum, Journal of the Catholic Education Association. See Appendix. "The ensuing complacency and the gradual exile of God from the public schools by secular humanist educators and the Courts led to an increased realization by many parents of the need for alternate schools and especially religious schools which would give God his rightful place." Certainly the motive of the advocates of tax relief for private school parents is to promote religion and religious education. Private schools and religion cannot be separated.

The statute also fails the third standard of the Lemon test, that of entanglement.

The Minnesota legislature attempted to separate religious from secular equipment, books, supplies, etc. That separation is simply not possible. Religious schools, as noted in the quoted editorial, do not set up their curriculum so that children are provided secular education in one class and religious education in another class. Religion is interwined throughout all of the classes. As noted in the editorial, the religious educator views the entire curriculum as a means of inculcating religious values in the students.

It is not as difficult to separate secular and sectarian expenses for activities outside the school and classroom, eg. transporation. Nevertheless, there is no way that the state can know whether a class in history, in which students use textbooks and other materials for which the parents receive a tax deduction, portrays history in a secular fashion or whether

it weaves in religious themes as well. In classes such as health, where parents receive a deduction for textbooks and other materials, Catholic schools may also discuss religious attitudes toward abortion. The only way the state can assure itself that the materials, for which deductions are received, are used only in a secular fashion is to send a representative to the classroom to attend a class. Merely auditing the taxpayer will not provide the information necessary to assure that the deductible items are being used solely for secular purposes. If state monitoring of religious schools is not "entanglement" with religion, then the word "entanglement" simply has no meaning.

Tax Deduction v. Tax Credit

The lower court attempts to distinguish between the statute in Nyquist and the Minnesota statute by distinguishing between a tax

deduction and a tax credit. "Whether a parent obtains a tax benefit depends upon whether the deduction is sufficient to move the taxpayers from a high tax bracket to a lower one. Thus, in this sense, the indirect tax benefit to the school is more diffused and less certain" than the benefit of a tax credit. 676 F.2d at 1204.

That reasoning is specious. Overall, the dollar amount of lost income to the state which is represented by the deductible amounts of private school tuition is considerable. The fact that the total amount of net tax savings may vary from individual to individual is not relevant. In fact, the net tax savings for some individuals may well be more than the amount of the New York tax credit found to be unconstitutional in Nyquist.

From the standpoint of the "purpose" (1st standard in Lemon) and the "effect" (2nd

standard in Lemon) of the statute - there is no difference between a credit and a deduction. The only difference is that in the former instance the exact amount of aid is known in advance, whereas in the latter the amount will not be known until the taxpayer's bracket is determined. In both cases the "purpose" is exactly the same - to aid religious schools. The "effect" may or may not be different depending on the dollar amount of the credit and the dollar amount of the deduction. If the deduction is large enough, its "effect" may even be greater than the credit. However, one thing is clear, since the effect of the deduction on public schools is di minimus, its "primary effect...advances...religion."

Analogy to Federal Charitable Deduction

The lower court discusses the federal tax exemption statutes for religious entitites. However, "dispensation granted under the free-

exercise clause is quite distinct from disbursements challenged under the non-establishment clause..." Freund, "Public Aid to Parochial Schools," 82 Harv. L. Rev. 1980, 1982 (1969).

The lower court erroneously compares the federal charitable deduction and the Minnesota statute and uses the analogy as an argument in favor of tax deductions for religious school expenses. First, there is no Supreme Court decision holding such deductions to be constitutional. But, assuming arguendo that such deductions pass constitutional muster, the analogue to tuition tax deductions is not appropriate.

Let us assume for purposes of argument, that the secular/sectarian breakdown of corporations, qualified under 26 U.S.C. §501(c)(3) to receive tax deductible contributions, is similar to the

break down between secular and sectarian elementary and secondary schools. Clearly, there is very little difference between the effect of the deduction on secular and on sectarian organizations, each being private and each receiving funding through private sources. Thus, a statute such as 26 U.S.C §501(c)(3) is not only neutral on its face, but also the primary effect of the statute does not favor sectarian over secular.

In the statute here, that is not the case. Although the statute may appear neutral on its face, there is a gross disparity between its effect on public and on private schools. Providing a deduction for public school tuition is like providing a choir robe and Bible deduction for all charitiable organizations. The American Red Cross uses choir robes and Bibles about as often as public schools charge tuition.

B. ARGUMENTS OF PROPONENTS

Aid to Parents, Not Schools

Proponents of tuition deductions and credits argue that the Minnesota statute and similar proposals are merely means of assisting parents - not schools - to seek an alternative method of educating their children. They argue that the purpose is to expand the choice of parents, to achieve diversity.

The dichotomy between pupil (or parent of pupil) benefit and benefit to the schools seems to be "a chimerical constitutional criterion. It is akin to the ineffectual effort in the mid-nineteenth century to classify such local measures as pilotage laws as either regulations of safety or regulations of commerce, and to make their validity turn on the classification. It was the beginning of wisdom when the Court candidly recognized that such measures were of both safety and commerce, and that before a

sensible judgment could be made, a closer look had to be taken at their consequences for both, as well as their exigency, in light of the policies underlying the commerce clause." Freund, supra.

Over the years lobbyists for private religious schools have succeeded in getting the Congress to include provisions for private schools in several pieces of federal education legislation such as: Educational Consolidation and Improvement Act, P.L. 97-35 (1981) (which "blocks" grants formerly included in the Elementary and Secondary Education Act, Impact Aid and others); National School Lunch Act, 42 U.S.C. §1751; Education for All Handicapped Children Act, P.L. 94-142 infra.

The validity of these provisions is defended on the ground that they exemplify aid to children, rather than aid to private schools.

It is submitted that this form of aid, too, is unconstitutional. However, we would argue that the provisions are different from that challenged here in that these federal programs provide additional services to the child which the child would not otherwise receive as a result of attendance at the private school - although it is still submitted that the incentive provided by these statutes to parents to induce them to enroll their children in private schools renders them unconstitutional.

In Minnesota, however, the state is not merely providing supplementary services, but is actually paying for the private school education itself, and the religious instruction which is an integral part of most private schools. See Freund, supra.

Choice

It is also argued that the tuition deduction provides an opportunity for private schools to compete with public schools, thus furthering parental "choice". However, there can never be "fair competition" between public and private schools.

Public schools, by their very nature, are organized to serve all school age children. The U.S. Constitution and various federal statutes (as well as good public policy) require public schools to serve society's most expensive children - eg. the handicapped, 20 U.S.C. §1401 et seq.; the sociologically and economically disadvantaged; the limited-English speaking, Lau v. Nichols, 414 U.S. 563 (1974). Private schools may serve some of these children but there is no requirement that they do so, and in fact, if these children had to depend on private schools for their education - they would not be

educated. Recently, for example, the Fairfax County, Virginia Human Relations Commission amended its rules so as to cease requiring private schools to serve handicapped children. Fairfax Journal, November, 1982. The private schools noted that they do not discriminate against handicapped children - they just do not have the facilities and services to meet their needs. Thus, parents of handicapped children in Fairfax, Virginia do not have a choice, regardless of whether Virginia offers a tax deduction or credit for tuition for private schools.

Statutes in every state in the land require the attendance of every school age child at a public school or at a private school which meets minimum state standards. Thus, no child can be denied a free education on any ground, whether economic or educational. Public education is a right. Private schools, on the other hand, may

decide who to serve and may charge students for attendance. Private education is a privilege, not a right.

Analogy to Federal Energy Credit

Proponents of tuition tax credits and deductions argue that these measures are no different than the federal measures such as the federal energy credit. They are right. The federal energy credit is an incentive, a reward, to get people to act in a certain way - ie. to buy and install storm windows and other energy services in order to conserve energy.

By the same token, the Minnesota legislature is using the tax incentive system to induce parents to send their children to private schools and thus to support the private religious system of education. The tax deduction certainly is no inducement to public school parents, because it offers deductions for

expenses which public schools do not charge.

Private Schools Serve a Public Purpose

The proponents also argue that private schools serve a public purpose by taking over the burden of the education of children who would otherwise be enrolled in public schools. This is inaccurate. First, as noted earlier, the most expensive-to-educate children are not enrolled in private schools. Second, "the education services of church schools are not rendered at the instance of the state, nor is a saving to the state the purpose or objective of such instruction. Religious instruction is calculated to strengthen religious faith and convictions, and the state may not constitutionally support such a project, even if indidental savings to the state can be shown." Gordon, "The Unconstitutionality of Public Aid to Parochial Schools", The Wall Between Church and State 73 (Oaks ed. 1963).

III. IMPACT OF THIS DECISION AT FEDERAL LEVEL AND IN OTHER STATES

The private religious school lobby's primary initiative has been at the federal level where the current Administration, following the lead of proponents of tax incentive initiatives in prior years, is now proposing major changes in the way that the federal government treats public education. The tuition tax credit for parents of private school students is the cornerstone of the Administration's proposal for federal involvement in education.

Under S. 2673, 97th Cong., 2d Sess., Cong. Rec. S. 7405 (June 23, 1982), which is a diluted version of the Administration's proposal, it is estimated that the tuition tax credit would average $89 per private school child in the first year, $215 in the second year and $321 in the third. On the other hand, spending by the federal government for public school education

will fall from $207 per child in 1980-1981 to $105 in 1984-85. The Effect of Tuition Tax Credits on Urban Schools, A Joint Report by the Council of the Great City Schools and American Association of School Administrators, August 1982.

Although the private schools have but one-fifth the need of public schools, the federal government is proposing that it now fund private school instruction at three times the rate of publics.

The Administration has not been as clever, however, as the Minnesota Legislature which attempted to disguise its sectarian motive so as to get around the Constitutional objections. Nevertheless, in both purpose and effect, there is no difference between the current Administration's tuition tax credit proposal and the Minnesota deduction at issue here. Both

have the intent to subsidize private religious education, even to the detriment of public schools. Both achieve that objective.

Twenty states and the District of Columbia (including Minnesota) have more that ten percent of the total elementary and secondary enrollment in non-public schools. National Center for Educational Statistics. Thus, should the Minnesota statute be upheld the private school lobby will assuredly begin lobbying these states to pass similar legislation. Rhode Island, as noted by the Court below, has already passed legislation which has been held unconstitutional by the First Circuit. Rhode Island Federation of Teachers v. Norberg, supra.

CONCLUSION

The Minnesota statute is an example of public policy-making at its worst. The right to a free public education is one of the things

which has made this country great. Statutes such as that at issue here have the potential of destroying support for that institution.

It is also important, of course, to preserve and protect the diversity of opportunities in education and in other areas of society. But not at the expense of the great American tradition of the public school which is offered to all free of charge: rich and poor, black and white, English-speaking and non English-speaking, handicapped and able-bodied.

The Minnesota legislature, in answer to a concerted and powerful private school lobby, has adopted a measure to advance the cause of religious education. It has attempted to disguise this unconstitutional intent in a cloak of "neutrality", but that cloak is gossamer and through it can be seen the true intent of the state. We hope this Court will see through this deception.

The Concept of Separation of Church and State is deep-rooted in our Constitution. This case exemplifies exactly the type of conflict that our Forefathers sought to avoid. Respondents note that the connections between Church and State are justified because the private schools take some of the educational burden off the State, because parents should have a choice of attending church schools and other reasons which may make some sense today. But what about tomorrow? Can any of these reasons justify the erosion, however slightly, of the Constitutional principles at risk here? At all costs, the absolute separation of Church and State must be assured so that over the years, we will be certain to avoid the devastating consequences seen in places such as Iran. The church must seek private sources of

support for their schools, just as the State must keep religion out of public schools.

> While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall. It was healthy when President Kennedy, as a candidate, was able to turn off some of the questions addressed to him on church-state relations by pointing to binding Supreme Court decisions. Although great issues of constitutional law are never settled until they are settled right, still as between open-ended, ongoing political warfare and such binding quality as judicial decision possess, I would choose the latter in the field of God and Caesar and the public treasury. This basic preference may help to account for what otherwise may seem a too rigid, and not sufficiently permissive, view of constitutional commands. Freund, supra at 1692.

Respectfully submitted,

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APPENDIX

TUITION TAX CREDITS: The American Way

from Momentum - Journal of the
National Catholic Education
Association, Oct. 1982, at 12.

The American tradition demands tuition tax credits. The hallmark of the United States and, many feel, its greatness has been the free enterprise system. Immigrants flocked to this country because they saw it as a land of opportunity for the willing. If one worked hard and well, one succeeded. If one were lazy or complacent, one fell behind.

This belief was reflected in education. Our schools were intended to help children be God-fearing, productive members of the American society. The schools existed in many forms -- Protestant, Catholic, Jewish, private and public. All performed a public function and, in this country's early years, were supported by public funds. Most would agree that this diversity has been a significant source of our strength as a society. Beginning in the 19th century, public support was restricted to public schools; a decision heavily influenced by the prevailing anti-Catholicism of the times. Many non-Catholic religious schools disappeared. Catholic bishops urged their flocks to increased sacrifices to continue parochial schools.

In short order public schools began to assume an educational monopoly. Like all monopolies, they became complacent and content with the status quo. As competition lessened,

so did quality. Excellence demands competition. In business in sports and in education, competition encourages creativity and the maximum use of energies and abilities.

The advent of Sputnik sent a shock throughout the system and caused an immediate renewal. As time progressed, this subsided. The ensuing complacency and the gradual exile of God from the public schools by secular humanist educators and the Courts led to an increased realization by many parents of the need for alternative schools and especially religious schools which would give God his rightful place. As a result, the past decade has seen an increased in the number of Protestant schools and Jewish day schools.

Through this century Catholic schools were able to continue their good work with the help of dedicated religious (sic). When, after Vatican II, these men and women began to choose other apostolates, their places were taken by equally dedicated laity -- but laity who, of necessity, needed higher salaries. Tuitions were instituted, then increased to compensate for these higher salaries and for the galloping inflation.

Now, we are faced with the need to help parents who desire a religious education for their children. Thes best method available at the moment is tuition tax credits. This system flows from established government tax policies of promoting and rewarding citizen initiatives which likewise help the country (deductions for charitable gifts and credits for energy-saving improvements).

The alternative to this assistance is a monopolistic public school system. The fact that such a system would no doubt fall into complacency is dangerous to America. The fact that of necessity it would be secularist disturbs many thoughtful Americans. Parents need to have a free choice when it comes to a product (their children's educaton) that they are forced to accept. To deny them help in making that choice, in reality to deny them a choice, is un-American.

Tax credits may not be a perferct answer and may have some faults, but it embodies one of the nation's more treasured rights -- the fundamental right of parents in choosing the form of education for their children. As such, the tax credit initiative should be supported as truly expressive of the American way.

by **Francis X. Barrett**
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MOTION FILED
FEB 2 1983

No. 82-195

IN THE

Supreme Court of the United States

VAN D. MUELLER AND JUNE NOYES,
Petitioners,

vs.

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Respondents.

On Writ of Certiorari to the United States Court of Appeal
For the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF PARENTS RIGHTS, INC., IN SUPPORT OF RESPONDENTS

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MOTION OF PARENTS RIGHTS, INC., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Parents Rights respectfully moves for leave to file a Brief as *Amicus Curiae* in support of Respondents.

Parents Rights is an organization consisting of over 20,000 parents and other individuals residing in all fifty states who seek to support freedom of choice and parental rights in education. The group's stated purposes are "to secure legal recognition for the right of parents to direct and control the education of their children; to secure true freedom of choice for parents in the education of their children; to undertake and support court action to achieve their goals; to publish literature and other materials to awaken the public to the denial of the human rights of the family in education."

The members of Parents Rights have a special interest in the litigation before this Court because as parents of children attending nonpublic schools and as advocates of governmental recognition of parental rights in education, their interests and concerns would be adversely affected by a ruling voiding the Minnesota statute. Such a ruling would discourage and prevent other states and Congress from allowing similar tax deductions for educational expenses. This brief will discuss the statute's purpose of using tax deductions to aid parents in exercising their right to direct and control their children's education.

All litigants have denied consent to file *Amicus Curiae* briefs.

Respectfully submitted,

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Keyishian v. Board of Regents, 385 U.S. 589 (1967) 20

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Pierce v. Society of Sisters, 268 U.S. 510 (1925) 4,5

Prince v. Massachusetts, 321 U.S. 158 (1944) 5

Shapiro v. Thompson, 394 U.S. 618 (1969) 18,20

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Speiser v. Randall, 357 U.S. 513 (1958) 18

Torcaso v. Watkins, 367 U.S. 488 (1961) 21,22

United States v. Jackson, 390 U.S. 570 (1968) 18

United States v. Seeger, 380 U.S. 163 (1965) 22

Walz v. Tax Commission, 397 U.S. 664 (1970) 17,23

Wisconsin v. Yoder, 406 U.S. 205 (1972) 5,14

Zorach v. Clauson, 343 U.S. 306 (1952) 17,21,22

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U.S. Const., Amend. XIV 19,20

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United States Code

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I.R.C. § 44A (1982) 9,10

I.R.C. § 44C (1982) 10

I.R.C. § 116A (1982) 11

I.R.C. § 127 (1982) 9

I.R.C. § 151 (1982) 7,9

I.R.C. § 163 (1982) 9

I.R.C. § 164 (1982) 9

I.R.C. § 165 (1982) 9

I.R.C. § 170 (1982) 11

I.R.C. § 213 (1982) 9

I.R.C. § 215 (1982) 9

I.R.C. § 1202 (1982) 11

I.R.C. § 1402 (1982) 10

I.R.C. (1952) § 4071 (1952) 7

OTHER AUTHORITIES

Bureau of the Census, Statistical Abstract of the United States (1980) 15

Bureau of the Census, Statistical Abstract of the United States (1981) 7

J. Coleman et al, Public Schools and Private Schools: A Report, 1981 (1981) 14,15

J. Cibulka et al, Inner City Private Elementary and Seccondary Schools: A Study (1982) 14

E. Chamberlin, Our Independent Schools (1944) 16

D. Cremin, The Transformation of the School (1961) .. 16

D. McGarry and L. Ward, Educational Freedom (1966) 15,16

National Center for Education Statistics, Digest of Education Statistics (1982) 7,13,15

National Center for Education Statistics, Projection of Education Statistics to 1986-87 (1978) 13

Marquette University, The Role of the School in American Democracy (1956) 16

M. Vanderwalker, The Kindergarten (1908) 16

United Nations, Universal Declaration of Human Rights (Reprint: 1981) 6,16

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For the Eighth Circuit

BRIEF OF PARENTS RIGHTS, INC., IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The members of Parents Rights have a special interest in the litigation before this Court because as parents and advocates of governmental recognition of parental rights in education, their interests and concerns would be adversely affected by a ruling voiding the Minnesota statute. Such a ruling would deprive Minnesota parents of helpful tax deductions and would discourage other states and Congress from allowing similar tax deductions for educational expenses of parents.

PREFACE

We are deeply indebted to the following persons for the time and effort they have contributed in compiling this brief: Peter W. Salsich, Jr., Associate Dean, St. Louis University School of Law; Dr. Daniel D. McGarry, Ph.D., Professor of Emeritus, St. Louis University; and Michael Kasperek and Shawn Elizabeth Carroll, students, St. Louis University School of Law.

SUMMARY OF ARGUMENT

The effect of the Minnesota Statutes (Minn. Stat. § 290.09 (22)) is to provide a negative form of help for all parents who incur certain additional expenses in the basic education of their children, in cases where these expenses are not already tax deductible. By so doing, the State of Minnesota helps parents to fulfill a legal and natural obligation and exercise a right under the Constitution with a somewhat lessened tax burden. In so doing, the State of Minnesota also applies and extends general income tax principles and practices which allow numerous deductions for expenses from gross income in calculating net income for tax purposes, so that parents participate as members of a broad class allowed such deductions. Among such allowable tax deductions in calculating taxable income are numerous deductions for other educational expenses, as well as deductions for necessary expenditures which reduce effective income and thus lessen ability to pay taxes, and deductions for personal expenditures which contribute to the public welfare. All of these three qualifications are present in the case of deductions of parental expenditures for the elementary and secondary education of their children. Nullification of the Minnesota statute would be unreasonable and inconsistent with general income tax principles and practices and would not conform to previous decisions of this Court. Such nullification would also overlook and negate various parental and personal rights of parents under the Constitution. Allowing the statute to stand would uphold the decision of three previous federal courts as well as the will of the State of Minnesota expressed through its elected representatives. It would also uphold reasonable negative accommodation of and benevolent neutrality towards personal values of citizens previously allowed by this Court.

ARGUMENT

I. THE EFFECT OF THE MINNESOTA STATUTE (MINN. STAT. § 290.09 (22)) IS TO HELP PARENTS FULFIL THEIR OBLIGATIONS AND EXERCISE THEIR RIGHTS CONCERNING THE EDUCATION OF THEIR CHILDREN.

A. Parents Have Both A Legal And A Natural Obligation To Provide For The Education Of Their Children.

Parents are required both by law and by nature to provide for the education of their children. All parents are required by the State of Minnesota, as well as by other States in the Union, to see to the education of their children. The compulsory education statutes of the State of Minnesota require that parents send their children to a public or private school for the greater part of each year from the age of seven to that of sixteen. Minn. Stat. § 120.10(1) and Minn. Stat. § 120.12(1-3).

Besides being required to do so by law, all parents also have a natural obligation to provide for the education of their children. This Court defined this natural obligation in the *Meyer* case when it said: "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to his station in life." *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) at 400. This Court also referred to this natural duty in the *Pierce* case when it declared: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925) at 535.

B. Parents Have A Right To Select And Direct The Education Of Their Children.

As this Court has several times noted, all parents likewise have a right to select and direct the education of their children. In the *Meyer* case, this Court said that a State could not attempt to assume exclusive control of education without "doing

violence to the letter and spirit of the Constitution." *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) at 402. The "natural duty of the parent to give education to his children" spoken of by the Court in this same (*Meyer*) case necessarily presumes a right, as is evident from the Court's decision upholding the parentally desired teaching of the German language in private schools. *Meyer,* 262 U.S. 390 (1923). This educational right of parents was clearly enunciated by this court in the *Pierce* case, wherein the Court spoke of "the right coupled with the high duty" of parents to educate their children. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925) at 535. This right was likewise referred to by this Court in *Everson* v. *Board of Education,* 330 U.S. 1(1947) at 18. The same right was reaffirmed by this Court in the *Griswold* case: "By *Pierce* v. *Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments." *Griswold* v. *Connecticut,* 381 U.S. 479 (1965) at 482. The same principle concerning the educational rights of parents was affirmed in *Minersville* v. *Gobitis,* 310 U.S. 586 (1940) at 599. The importance of the primary education right of parents was likewise insisted on by this Court in the *Prince* case: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents...." *Prince* v. *Massachusetts,* 321 U.S. 158 (1944) at 166. The principle that parents possess the primary right in education was also an essential element in this Court's decision in the *Yoder* case, wherein the Court's opinion noted that "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) at 232. This widely recognized right is also guaranteed by the United Nations Declaration of Human Rights to which the United States is a signatory. Article 26 Section 3 of this Declaration says: Parents have a prior right to choose the kind of

education that shall be given to their children." UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS, § 26 sec. 3 (Reprint, 1981).

C. The Fulfilment And Exercise Of Parental Obligations And Rights Concerning The Education Of Their Children Involve Considerable Expenses.

Parents in Minnesota and other States currently fulfil their educational obligations and exercise their right of choice regarding the education of their children at considerable expense. This is true of parents who send their children to public schools as well as of parents who send their children to parental or private schools. Some parents choose to fulfil their educational obligation through public schools which are mainly free of charge, while other parents prefer to send their children to non-governmental schools for their education. Parents who choose to send their children to public schools fulfil their natural and legal obligation as well as exercise their right to educate their children by supporting tax levies for educational purposes, by voting for candidates who endorse the latter, by paying educational taxes, by seeking that their children attend school, and by fostering their children's education and success in school in various ways, including assumption of additional expenses for special instruction, equipment, and supplies. Parents who prefer to send their children to non-governmental schools for various reasons both contribute their share of the cost of educating their neighbors' children by paying similar educational taxes and in addition pay the tuition and other charges of education in parental schools which they consider best for their children. Both groups of parents bear additional expenses for special instruction, equipment, and supplies.

Educational costs as well as other costs of child support and rearing have multiplied several times in recent years. Thus in 1960 the average per-pupil cost for public, elementary and secondary education in the United States was $472.

NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATON STATISTICS (1982) 80. By 1980 this had multiplied over 5 times and had risen to $2494. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS (1982) 80. Meanwhile general costs multiplied about 2.8 times. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1981) 458-460.

During the period from 1950 to 1980 the proportional value of income tax deductions for dependents greatly diminished. In 1950 the median family income was $3319 and the allowable personal exemption was $600 per person, or $2400 for a family of four. This amounted to 72% of the current median family income. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1981) 436. I.R.C. § 4071 (1952). In 1979, the median family income was $19,661, or almost six times as much. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1981) 436. But the personal exemption had only risen by about 66% to $1,000 or $4,000 for a family of four, which amounted to only about 20% of the family income. I.R.C. § 151. Thus the personal deductions had lost four fifths of their proportionate value, despite their increase to $1,000.

D. **The Minnesota Statute Lightens The Tax Burden Of All Parents With Educational Expenses In Rearing And Educating Their Children.**

Partly to ease the parental tax burden and the disproportionate rise in the expenses of rearing and educating their children and the inadequate increase in personal deductions allowable in calculating income taxes, the Minnesota Statute allows comparatively small deductions for educational expenses borne by parents. The Statute thus enables parents to bear the heavy expenses associated with rearing and educating children. In doing so it allows tax deductions proportionate to the actual

educational expenses of parents. If the amount of forgiveness is somewhat higher in the case of some parents, it is because they have larger educational expenses. Many of the educational expenses of parents are already deductible, being paid through taxes which are tax deductible.

II. THE MINNESOTA STATUTE ALLOWING EDUCATIONAL TAX DEDUCTIONS APPLIES AND EXTENDS GENERAL INCOME TAX PRINCIPLES AND PRACTICES SO THAT PARENTS PARTICIPATE AS MEMBERS OF A VERY BROAD CLASS.

Both federal and state income tax laws allow numerous deductions for educational expenditures, for expenses that reduce effective available income and lessen ability to pay taxes, and for personal expenditures that contribute to the public welfare. The Minnesota statute for educational tax deductions is a reasonable extension of such income tax principles and practices, which take into consideration both ability to pay and the public welfare.

A. The Minnesota Statute Applies And Extends General Income Tax Principles And Practices That Allow Numerous Deductions For Educational Expenses

Numerous deductions for educational expenses are already allowed by state and federal income tax laws. See below. The Minnesota Statute applies and extends the general income tax principles and practices involved in the allowance of deductions for educational expenses. These deductions are explained by reduced effective income with lessened ability to pay on the one hand, and the contributions that education makes to the general welfare on the other hand.

Both state and federal income tax laws allow numerous deductions for educational expenses. Among the latter are educational expenses incurred after one has completed one's regular education and engaged in income-producing work. Thus

income tax deductions are allowed for educational expenses incurred in order to enhance one's work skills or one's professional competence. I.R.C. § 1.162.5 (a)(1); Minn. Stat. § 290.09. Income tax deductions are also allowed for the expenses of further education required by one's employer. I.R.C. § 1.162.5, (a)(2); Minn. Stat. § 290.08

The federal tax system also allows employers to deduct money for educational assistance paid to an employee for the latter's further education. I.R.C. § 127. Deductions are also allowed by both federal and state income tax laws for expenses involved in providing day care and education for pre-school children when a single parent or both parents work. In this case the increased cost of the day care caused by the addition of simultaneous education is allowed as a deduction. I.R.C. § 44A. As has been noted, taxes paid for public education are deductible. Such taxes are levied upon the public at large on the principle that education of children is a public benefit, a proposition that also applies to private education. I.R.C. § 164.

B. The Minnesota Statute Applies And Extends The General Income Tax Principle And Practice That Allows Deductions For Many Expenses That Diminish Effective Income And Lessen Ability To Pay Taxes.

Numerous tax deductions are allowed by both federal and state laws for personal expenditures that reduce effective personal income and diminish ability to pay taxes. Among such are: tax deductions for medical and dental expenses, I.R.C. § 213; Minn. Stat. § 290.09 (10); tax deductions for casualty and theft losses, I.R.C. § 165, Minn. Stat. § 290.09 (5); tax deductions for alimony paid to an ex-spouse, I.R.C. § 215, Minn. Stat. § 290.09 (14); tax deductions for interest on loans or credit, I.R.C. § 163, Minn. Stat. § 290.09 (3); tax deductions for the support of dependents, including children even when the latter are reared in a particular religion, I.R.C. § 151; tax deduc-

tions for child care expenses of working parents. I.R.C. § 44A, and tax deductions for numerous expenses incurred in gaining income. I.R.C. § 1402. Minn. Stat. § 290.09 (2).

The reduced effective income and lessened ability to pay taxes on the part of parents with additional educational expenses are induced by circumstances beyond their control. Included among these circumstances are state compulsory education laws, the lack of participation in public financing, and the absence of certain subjects and accessories in public education.

C. The Minnesota Statute Applies And Exends General Income Tax Principles And Practices Whereby Numerous Personal Expenditures That Contribute To The Public Welfare Are Tax Deductible

1. Numerous Tax Deductions Are Allowed For Personal Expenditures That Contribute To The Public Welfare According To General Income Tax Principles And Practices

Numerous tax deductions are allowed by both state and federal laws for personal expenditures that contribute to the public welfare, in accordance with general income tax principles and practices. Among such allowable deductions are deductions for educational expenditures previously mentioned, as well as deductions for educational taxes that support public education. Tax credits are allowed for various energy-saving expenditures in order to conserve precious energy for the public good (present and future) I.R.C. § 44C. That educational expenditures of parents contribute to the public good is as true of private education as it is of public education, and as true of additional educational expenditures as it is of educational taxes. It is universally accepted that the education of children contributes to the public good, especially in a democracy. Tax deductions for child support involve recognition that today's children are tomorrow's

workers, defenders of the state, taxpayers, voters, public officials and custodians of learning. Numerous diverse additional expenditures are made tax deductible for like reasons, including expenditures by farmers for clearing lands.

Sixty or fifty percent of long term capital gains are tax deductible, on the apparent principle that capital investments help the economy and thus promote the public welfare. I.R.C. § 1202, Minn. Stat. § 390.16(4). The federal deductibility is sixty percent and the Minnesota deductibility if fifty percent. A like principle is apparently involved in the partial deductibility of dividends that has been allowed by the federal government. I.R.C. § 116A. Political expenditures of candidates for public office and contributions to the latter are likewise tax deductible apparently on the principle that broad political participation is good for the country. I.R.C. § 41, Minn. Stat. § 290.09(2). Contributions to religious, charitable, scientific, and literary organizations, even to those of which one is a member and from which one derives benefits, are likewise tax deductible. I.R.C. § 170.

2. Educational Expenditures By Parents Contribute To The Public Welfare

Educational expenditures by parents contribute to the public welfare in several ways. These expenditures provide basic education, enhance the contents of education, provide special education as needed or deemed desirable, save considerable money for the state and taxpayers, involve parents more intimately in education, and preserve the many benefits of private education, while they also constitute an exercise as well as a safeguard of personal freedoms.

a) Educational expenditures by parents provide the benefits of *basic education* for children. That basic education is essential for the citizens of a democracy, and that it contributes to the public welfare is universally recognized. For this reason the education of children is mandated by all states in the union, and

various taxes for the liberal support of free public schools are levied on the public. In the case of parents of public school children, these educational expenditures for basic education are made by paying taxes that support public schools. In the case of parents who send their children to non-governmental parental schools, these expenditures are made by paying the tuition and additional expenses involved, as well as by paying the taxes that support public schools. The addition of instruction concerning religion and religion-based morality to the basic secular education provided in private schools does not cancel, and in fact may even increase the contribution to the public welfare made by these schools.

b) Educational expenditures by parents also augment basic education by *additional education*. In general, with certain limitations, the fuller the education of children, the greater the benefit not only for the children but also for society. Additional expenditures for education made by public school parents enhance their children's education as is exemplified by expenditures for physical education accessories, equipment for musical and dramatic activities, driver-education, special tutoring, and summer school attendance. All of these additional expenditures enhance the content and efficacy of the education of children. Similarly parental expenditures for attendance of children at schools that include such features such as more attention to basics and more discipline, as well as religious instruction and religion-based morality, may also enhance the education of such children and contribute to the public good.

c) Additional educational expenditures by parents often provide *special types of education* beneficial to certain children and thus to society, when such education is not available from the public schools. For some children a boarding school is best when home conditions are not conducive to proper upbringing or when the child needs a fresh start and special direction. In some cases such education is necessary, as when both parents or a single parent are away from home a great deal of the time. For certain children the Montessori method or some other special

method of education may be better. For some children a vocational type of education that may not be available in the public schools may be best. Some parents feel that religion is the most important thing in life and that it should be included in the daily curriculum along side secular subjects. For parents who assume the heavy costs of special education and do not utilize the public schools they support, educational tax deductions are both helpful and reasonable.

d) An important and very tangible benefit to the public from additional parental educational expenditures made by both public and private school parents is the enormous *savings* they effect for taxpayers at large and for the state. In some cases parental expenditures provide for supplemental equipment, supplies, and education that might otherwise have to be taken over by the state. Examples include purchase of gym shoes, rental of musical instruments, and driver education. In other cases parents assume the entire cost of education. The estimated annual average per-pupil cost of public education in the United States in 1982-1983 is about $3,000. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS (1982) 81, 82, 47; and NATIONAL CENTER FOR EDUCATION STATISTICS, PROJECTION OF EDUCATION STATISTICS TO 1986-87 (1978) 14, 15, 90, 91. It is thus estimated that in general each child who does not attend a public school saves taxpayers about $2500. Since there are about five and a half million children in non-governmental parental schools today, this saves taxpayers and the state some $13,750 million or $13.75 billion a year. *Id.* This saving of $2500 per child per year, provided by parents who also support the public schools, deserves some recognition. In Minnesota it has been recognized by the legislature, by the governor, and by the courts. Because of this expenditure and saving, Chief Justice Burger, joined by Justices White and Rehnquist, would have even allowed direct money grants to parents of children in parental schools on the basis that "...a State should be permitted to reimburse parents of private school children — partially

at least — to take into account the State's enormous savings in not having to provide schools for these children.... It is no more than simple justice to grant partial relief to parents who support the schools they do not use." Dissenting Opinion in *Committee For Public Education* v. *Nyquist,* 413 U.S. 756 at 802-803 (1973) If this can be said of direct money grants to a limited class of parents, what should be said of indirect negative relief to members of a broad class?

e) The *greater parental involvement* in the education of their children brought about by additional educational expenditures contributes to the effectiveness of both public and private school education and thus promotes the public interest. Studies seeking to explain the remarkable success of private schools in educating minority children in inner cities attribute this partly to the greater involvement of their parents in the educational enterprise. See CIBULKA ET AL, INNER CITY PRIVATE ELEMENTARY SCHOOLS (1982); COLEMAN, ET AL, PUBLIC SCHOOLS AND PRIVATE SCHOOLS: A REPORT (1981). The recognition of the value of parental involvement in the education of children was noted by this Court in the *Yoder* case when it said: "the values of parental direction of the ...upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) at 213.

f) Educational expenditures of parents also contribute to the survival of *private education* and the benefits it confers. Private education, whose existence is one of the marks of free democratic states as opposed to totalitarian states, helps both our country in general and education in particular in many ways, yet its substantial survival is far from insured. Proportionate enrollments in private schools as compared to public schools have declined regularly, despite brief intermissions, since the introduction of free public education in this country in the mid-nineteenth century. When free public education was introduced, the great majority of children were in private schools;

at present only about 11% of our country's children attend private schools. See NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS (1982) 7. In the eleven year period from 1965 to 1976, attendance at private schools dropped 24%, falling from about 6,304,800 to 4,804,000 students, with inflation and high taxes the probably principle reasons. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1980) 138-140. A resumption and continuation of this decline would probably result in a practical elimination of private education in the United States, except for the very affluent and a few others.

1) Private education *helps to ensure the health and progress of public education.* Private education provides a means of comparison, stimulating example, and a modest measure of competition for public education. The recent effects of the Coleman report concerning the excellent results of private education illustrate this point. See JAMES S. COLEMAN ET AL, PUBLIC SCHOOLS AND PRIVATE SCHOOLS: A REPORT (Chicago, National Opinion Research Center, 1981) and various newspaper and periodical articles and editorials on the subject since its publication.

2) Private education preserves *private enterprise and continuing improvements* in education. It prevents the imposition of a stifling bureaucratic deadhand and straightjacket that might result from a government monopoly of education such as is found in totalitarian countries. See DANIEL D. McGARRY, "INTERNATIONAL PANORAMA" IN EDUCATIONAL FREEDOM, ED. DANIEL D. McGARRY AND LEO WARD (1960) 55-64. Not only did private education provide the original model and inspiration for public education, but it has continued to *pioneer many important improvements* in education. Among relatively recent innovations pioneered by private education are kindergartens, vocational education, combined work and study programs, special education of the handicap-

ped, such as the blind, the deaf, and the less gifted, adult education, evening school, smaller classes, individual instruction, and many others, including the Montessori program and even Progressive Education. When many public schools went overboard with Progressive Education, private education in general was more conservative and continued to stress the basics. See CHAMBERLIN, *OUR INDEPENDENT SCHOOLS* (1944); W. BRICKMAN and SHANNON in *THE ROLE OF THE INDEPENDENT SCHOOL IN AMERICAN DEMOCRACY* (1956), 61-82 and 83-92; and BRICKMAN in *EDUCATIONAL FREEDOM,* ed. DANIEL D. McGARRY and LEO WARD, (Milwaukee, Bruce, 1966), 1-22; CREMIN, *THE TRANSFORMATION OF THE SCHOOL...* (1961); VANDERWALKER, *THE KINDERGARTEN...* (1908).

3) An important contribution of private education in a free, pluralistic democracy such as ours is the *educational alternatives* that it offers *and the freedom of choice* in education that it provides. The freedom of parental choice in education guaranteed by this Court in such cases as *Meyer* and *Pierce,* and asserted by the UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS would be meaningless in the absence of alternative schools. But this situation already prevails in many parts of this country especially in communities apart from highly populated urban areas.

III. NULLIFICATION OF THE MINNESOTA STATUTE WOULD BE INCONSISTENT AND WOULD NEGATE PERSONAL RIGHTS; WHEREAS ALLOWING IT TO STAND WILL UPHOLD NEUTRAL AND BENEVOLENT GOVERNMENTAL ACCOMMODATION OF PERSONAL VALUES

A. Nullification Of The Minnesota Statute Would Be Unreasonable And Inconsistent.

It has been seen that the allowance of educational tax deductions for parents, including parents who send their children to schools that include religion in their curriculum, is both reasonable and consistent. Such deductions make allowance for reduced ability of parents to pay taxes due to required expenditures which provide a public benefit. They are also consistent with numerous other deductions allowed by state and federal income tax laws, including other deductions for educational expenses. It has also been noted that the benefit conferred on parents who send their children to schools that include religious instruction as well as secular subjects, is negative, and that such parents participate as members of a broad class. Meanwhile the benefit conferred on the schools they choose is secondary and indirect, as well as conditional upon the free choice of parents.

Opponents of the Minnesota statute object, however, that the Statute is unconstitutional because it ultimately helps church-related schools to some extent, and in doing so ultimately also helps to advance religion to some extent. But, as this Court has several times noted, an ultimate benefit to religion resulting from a statute is not in itself disqualifying. *Everson* v. *Board of Education,* 330 U.S. 1 (1947) at 17-18; *Zorach* v. *Clauson,* 343 U.S. 306 (1952) at 312-314, *Board of Education* v. *Allen,* 392 U.S. 236 (1968) at 242; *Walz* v. *Tax Commission,* 397 U.S. 664 (1970) at 671-672.

The alleged reason for nullification is some ultimate secondary advancement of religion in certain cases. But tax exemptions for religious organizations together with similar exemptions for church-related schools and their property, as well as personal income tax deductions for direct contributions to churches and church-related schools, that are provided by governments and allowed by the courts actually advance religion much more directly and more efficaciously than do tax deductions for the educational expenses of parents, some of whom send their children to church-related schools. In the first cases the whole benefit goes directly to the church and its religious mission or to

the school and its partly religious mission; whereas in the latter case any financial benefit is indirect, and accrues only after the deduction of the considerable expenses of mainly secular education, including teacher salaries and overhead costs (such as those for heating and maintenance). If one would accept the reasoning of opponents, state and federal allowance of deductions for contributions to charitable, religious, educational, fraternal, and scientifice organizations would logically have to be invalidated if it were found that, at a given time, churches and church-related institutions received the greater part of such contributions.

B. Invalidation Of The Statute Would Negate Parental And Personal Rights.

1. Invalidation Of The Statute Would Negate The Right Of Parents To Direct The Education Of Their Children

It has been seen that parents have a right to direct and control the education of their children, a right which has several times been affirmed by this Court. But this Court has also several times said that a state may not impose a penalty upon the exercise of a right guaranteed by the Constitution, unless such action is necessitated by a substantial and compelling state interest. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) at 631-633; *United States* v. *Jackson,* 390 U.S. 570 (1968) at 582-583; *Sherbert* v. *Verner,* 374 U.S. 398 (1963) at 404-407; *Speiser* v. *Randall,* 357 U.S. 513 (1958) at 525-526. No substantial and compelling state interest that would necessitate denial of this parental right has been shown to be present in the instant case. In fact, the contrary is seen to be true.

2. Invalidation Of The Statute Would Inhibit The Right Of Free Exercise Of Religion

Nullification of the Minnesota Statute on the grounds that some benefitted parents send their children to church-related

schools would obviously inhibit the free exercise of religion. One of the essential elements of the free exercise of religion is the ability to pass on one's religious beliefs and practices freely and effectively to one's children. As this Court has said in the *Schempp* case, "...the Free Exercise Clause...recognizes the value of religious training, teaching, and observance, and more particularly the right of every person to freely choose his own course with reference thereto..." *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) at 222. If the Court were to disallow the deductions because they include among negatively benefitting taxpayers the parents of children who send their children to church-related schools, the Court would, in effect, be penalizing a right under the Constitution, which would be unconstitutional unless this was necessitated by a compelling and substantial state interest. For this would be contrary to the principle enunciated by this Court in the *Shapiro, Sherbert,* and *Speiser* cases, cited above.

If the proposition alleged by opponents in the instant case were accepted, it would follow that the tax deductions allowed for dependents by state and federal income tax codes should be disallowed if some parents were spending a considerable amount of their time, energy, and resources rearing their children as devout Christians, Jews, or Mohammedans.

3. Nullification Of The Minnesota Statute Would Inhibit The Freedoms Of Speech And The Press, Including Freedom Of Education, Protected By The First Amendment.

Among freedoms protected by our Constitution are freedoms of speech and the press, which are understood as including educational freedom. These freedoms are guaranteed by the First Amendment as extended to the states by the Fourteenth Amendment. *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) at 303; and *Griswold* v. *Connecticut,* 381 U.S. 479 (1965) at 400-402, 410, and 482-483. As this Court said in the *Griswold* case: "...the State may not, consistently with the spirit of the

First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and the press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read....and freedom of inquiry, freedom of thought, and freedom to teach ...." *Griswold* v. *Connecticut,* 381 U.S. 379 (1965) at 482-483. As this Court said in the *Keyishian* case: "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value.... That freedom is therefore a special concern of the First Amendment..." *Keyishian* v. *Board of Regents...,* 385 U.S. 589 (1967) at 603.

4. Nullification Of The Statute Would Withhold The Equal Protection Of The Laws Mandated By The Fourteenth Amendment.

Nullification of the Minnesota Statute because of its benefit to parents who send their children to church-related schools would deny such parents the equal protection and benefit of the law without sufficient reason and would thus be contrary to the Fourteenth Amendment. Such nullification would create an unjustified special classification which would exclude parents of such children from participating in a general and common benefit. Such a classification creating "an invidious discrimination" denying them equal protection of the laws, would "chill the assertion of constitutional rights by penalizing those who choose to exercise them..." to use words of this court in *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) at 627 and 631. As this Court decided in *Shapiro,* imposition of a burden upon the exercise of a constitutional right is unconstitutional unless it is necessary in order to protect a compelling governmental interest. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) at 634.

C. Abstention From Invalidating The Statute Will Uphold Acceptable Governmental Accommodation, Neutrality, And Benevolence Toward Deeply Held Personal Values Of Citizens

This Court has several times stated that although the First Amendment requires neutrality towards personal values of citizens, including religion, the Amendment does not require hostility toward such values. This Court has also explained that the neutrality of government regarding special values including religion may be benevolent in that it may respect and accommodate the special values of citizens and facilitate their pursuit.

This Court has several times reiterated the constitutional requirement of governmental neutrality toward religion, irreligion and various religions. *Everson* v. *Board of Education,* 330 U.S. 1 (1947) at 16 and 18; *Zorach* v. *Clauson,* 343 U.S. 306 (1952) at 313-314; *McCollum* v. *Board of Education,* 333 U.S. 203 (1948) at 211-212; *Abington School District* v. *Schempp,* 374 U.S. 203 (1963), at 203 and 226; *Torcase* v. *Watkins,* 367 U.S. 488 (1961) at 495; *Board of Education* v. *Allen,* 392 U.S. 236 (1968) at 242-245.

This Court has also repeatedly insisted that neutrality toward religions does not mean hostility, and that not only is hostility not required, but it is actually forbidden. *Everson* v. *Board of Education,* 330 U.S. 1 (1947) at 16 and 18; *McCollum* v. *Board of Education,* 333 U.S. 203 (1948) at 211-212; *Zorach* v. *Clauson,* 343 U.S. 306 (1952) at 313-314.

This Court has sustained and even mandated governmental accommodation of deeply held personal values of citizens when there is no compelling and substantial state interest that necessitates the contrary. In the *Sherbert* case this Court upheld the right of a Sabbatarian to receive social security compensation despite the fact that she refused to work on Saturdays because of her religious beliefs. *Sherbert* v. *Verner,* 374 U.S. 398 (1963). In so doing, the Court explained: "This holding but reaffirms a principle that we announced a decade and a half ago, namely that 'no State may exclude Catholics, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of*

their faith, or lack of it, from receiving the benefits of public welfare legislation' " *Id.*, at 410. This Court has upheld the exemption from compulsory military service laws of conscientious objectors who claim that their religious beliefs forbid them to participate in the armed services. *Gillette* v. *U.S.*, 401 U.S. 437 (1971) at 450-453. It has done so even when they are not members of any formal religious group, and their "religion" does not include belief in God. *Torcaso* v. *Watkins,* 367 U.S. 488 (1961); *United States* v. *Seeger,* 380 U.S. 163 (1965) at 173-180. This sort of accommodation was referred to with approval by Justice Brennan in the *Schempp* case with reference to government provision of chaplains and religious services for prisoners and members of the armed services who otherwise might be deprived of religious services. In his concurring opinion Justice Brennan noted that "...hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion." *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) at 299.

As this Court explained in the *Zorach* case, while the proper attitude of government toward religions is one of neutrality, it is also one of cooperation with citizens in pursuit of their spiritual needs and purposes. Justice Douglas, writing for the majority in *Zorach* said: "When the state encourages religious instruction or cooperates with religious authorities ... it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe...But we find no constitutional requirement that makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach* v. *Clauson,* 343 U.S. 306 (1952) at 313-314.

In the *Walz* case this Court restated this reasoning and characterized the proper attitude of the state to religion as one of "benevolent neutrality." In this case, Chief Justice Burger, writing for the majority said: "The general principle deductible from the First Amendment and all that has been said by this Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality..." *Walz* v. *Tax Commission*, 397 U.S. 664 (1970) at 669.

CONCLUSION

In extending allowable tax deductions to include deductions for educational expenditures by parents, the State of Minnesota has alleviated the heavy burden born by parents in at least a negative manner while observing guidelines intimated by this Court in *Committee For Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973) at 789-794. The direct beneficiaries of the allowed tax deductions are parents who participate as members of a very broad class. This class is composed not only of parents of public school and parental school children, but also of all taxpayers enjoying similar deductions because of expenditures which reduce effective income or contribute to the public good. The State of Minnesota has meanwhile manifested the benevolent neutrality toward personal values praised by this Court. Its Statute, passed by the state legislature, approved by the governor, and declared constitutional by three federal courts, has an acquired as well as inherent assumption of constitutionality and should be allowed to stand, as it has for over twenty-six years.

Respectfully submitted,

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No. 8[illegible]

In The

Supreme Court of the United States

October Term, 1963

Van D. Mueller and Judy Noyer,
Petitioners,

v.

Oliver R. Allen, Jr., Dennis J. Breitbaum, Karen F. Breitbaum, Thomas W. Dee, Mary J. Dee, Edward F. Fujan, Joleen A. Fujan, Brenda R. Hoffer, Richard C. Hollingsworth, Marjorie Hollingsworth, Robert DeHaan and Dorothy DeHaan,
Respondents.

Appeal from the United States Court of Appeals for the Eighth Circuit

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[illegible]

QUESTIONS PRESENTED

Whether the Minnesota statute subverts the holdings of this Court in Establishment Clause cases giving special status thereunder to public schools; and further, whether the effect of such a statute works detrimentally to the welfare of public schools in encouraging enrollment in church schools, leading ultimately to the financial distress of public schools and to racial and class segregation therein.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-195

VAN D. MUELLER and JUNE NOYES,
Petitioners,

v.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,
Respondents.

Appeal from the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR UNITED AMERICANS FOR PUBLIC SCHOOLS

United Americans for Public Schools, pursuant to Revised Rule 36 of this Court, respectfully applies to this Court for leave to file its annexed brief as amicus curiae in support of Petitioners in the above entitled action, on the following grounds:

1. Amicus Curiae has obtained consent of the Petitioners but not of Respondents to the filing of this brief.

2. This action presents questions, including those set forth in Petitioners' Jurisdictional Statement, to which amicus refers and incorporates herein. In addition, amicus suggests the following:

> Whether the Minnesota statute subverts the holdings of this Court in Establishment Clause cases giving special status thereunder to Public Schools.
>
> Whether the effect of such a statute as here involved works detrimentally to the welfare of Public Schools in encouraging church school enrollment, leading to financial distress, racial and class segregation, in public schools.

3. Interest of United Americans for Public Schools.

United Americans for Public Schools is a California non-profit corporation, formed in 1953, and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California, with special reference to the public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members, and to the public, related and objective educational facts and findings to preserve the purposes of public schools and of said constitutions, and to foster adherence thereto and support thereof.

Accordingly, acting in such capacity, Movant initiated action to declare unconstitutional a California statute effective January 1, 1973 which granted tax credits to parents of children attending non-public schools. *United Americans for Public Schools* v. *Franchise Tax Board.* A federal three-judge court declared the statute unconstitutional. This Court upheld that decision on Movant's motion to affirm. 419 U.S. 890, October 21, 1974.

The position of the eighth circuit is in direct conflict with the principles of our case, and if upheld, would make naught of Movant's efforts in California. Not only is the principle of *stare decisis* involved, but failure to overturn

the eighth circuit decision would eventually open the floodgates for public aid to religiously-oriented schools in California and elsewhere, all in contravention of Movant's interests and stated objectives.

Thus Movant's members, as citizens and taxpayers of the United States and of the State of California, are vitally concerned, both personally and economically, in the issues of the instant case, because (1) of their concern generally with preserving the purposes of public schools and the Constitutional doctrine of separation of church and state, (2) because the statute under attack, but held valid below, constitutes a thinly veiled attempt to subsidize church schools from funds that belong in the public treasury, contrary to established principles of separation of church and state and contrary to Movant's stated purposes and objectives.

4. Reason for submission of brief.

The detrimental effect upon the free American public school system of the Minnesota legislation and other like legislation has not been sufficiently explored in the decisions and briefs below.

It is respectfully requested on the above grounds that this application for leave to file a brief as amicus curiae be granted.

Respectfully submitted,

UNITED AMERICANS FOR
PUBLIC SCHOOLS

HENRY C. CLAUSEN
Attorney for Movant

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-195

VAN D. MUELLER and JUNE NOYES,
Petitioners,

v.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,
Respondents.

Appeal from the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR UNITED AMERICANS FOR PUBLIC SCHOOLS

INTEREST OF THE AMICUS CURIAE

United Americans for Public Schools is a California non-profit corporation, formed in 1953, and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California, with special reference to the public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members, and to the public, related and objective educational facts and findings to preserve the purposes of public schools and of said constitutions, and to foster adherence thereto and support thereof.

STATUTE INVOLVED

The statutory provisions involved in this suit appear in Petitioners' Jurisdictional Statement to which amicus refers and incorporates herein.

STATEMENT OF THE CASE

Reference is made to the foregoing motion and to Petitioners' Statement.

SUMMARY OF ARGUMENT

History records that governmental aid, both direct and, as here, indirect, to private and church schools is destructive of our *constitutionally favored public school system.* An exodus of public school students to private and church schools results; church schools are thus caused to proliferate, leading inevitably to class and racial segregation in public schools and to an increase in the financial plight of the public school system. The dramatic increase in the Minnesota tax deduction bears out the warnings of the Court in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), in which we were Amici Curiae, and which case should control here.

ARGUMENT

I. HISTORY DEMONSTRATES THAT THE ULTIMATE EFFECT OF STATUTES LIKE THAT OF MINNESOTA IS TO JEOPARDIZE SERIOUSLY OUR FREE AND CONSTITUTIONALLY FAVORED AMERICAN PUBLIC SCHOOL SYSTEM.

As Justice Brennan said in his concurring opinion in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, at page 230:

> "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."

And at page 241-242:

> "The American experiment in free public education available to all children has been guided in large

measure by the dramatic evolution of the religious diversity among the population which our public schools serve. . . The public schools are supported entirely, in most communities by public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. (citing case) This is a heritage neither theistic or atheistic, but simply civic and patriotic. (citing case)."

Justice Frankfurter in *McCollum* v. *Board of Education*, 333 U.S. 203, at 212-222, reviews extensively the history of the public school system and in part the attempts over the years to secure public aid for private and church schools. At pages 216-217 he states:

"The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice."

The wisdom of these observations is demonstrated today in the bloody and savage brutalities and religious atrocities in Lebanon, Iran and Iraq, and Northern Ireland.

The history to which Justice Frankfurter alludes demonstrates that governmental aid to private and church schools in America (and elsewhere) is destructive of our public school system. The opinion documents the following:

In 1812 New York State enacted laws which set up a system of public schools. But New York City fought for the right to stay out of that system. This resulted from intensive pressures of private and church schools. The legislature yielded to these demands and as a result New York, the largest city in the state, proceeded under its own system. There then ensued bitter conflicts which raged for 30 years among more than fifteen religious denominations, private schools, church schools, voluntary associations, the schools which were substituted for the public schools. The war was bitter for a share in the division of tax funds allotted from the State treasury. Exposures showed many instances of "cut-throat" competition, enrollment padding, proselyting and duplicating of competing schools in the same neighborhood, because more numbers of students would entitle the city to additional funds.

There was constant turmoil. The Bethel Baptist Church controversy started in 1821, and ended with the Roman Catholic controversy in 1842. Logrolling in the Legislature was rampant. After 30 years of fighting and struggling a climax came in 1842 when the state legislature finally decided to establish a public school system in New York City under local control.

Overseas in Holland in the 19th century an attack was levied upon the principle of separation of church and state. Salary subsidies were enacted for church and other private school teachers. Such subsidies increased until finally legislation was passed for full public funding of

all church and private schools. This later became part of the Dutch constitution in 1917. Thereupon, religious leaders pressured their flocks to send children to their particular church schools. As a result of this campaign, the enrollment in public schools fell from 79% in 1860 to 27% as of 1978, and of the total governmental expenditures for education, the public schools received as of 1978 a dismal 19%.

See Church & State, Vol. 27 No. 10, pages 7 to 8, November 1974 (a definitive study of assistant editor Menendez, in the official organ of the United Americans). Also, Vol 6 the new Encyclopaedia Britannica, p. 380f.

The Dutch historical experiences are a continuous entanglement between church and state because there is no separation. Governmental funding of church schools from tax money—teacher's salaries, erection of buildings, maintenance, inspection—(called free schools) have escalated, step to step, until what we would call the public schools have been lost in the shuffle. This crept along until it became the norm.

The public schools were required to accept all children but the church schools could segregate along religious lines, indoctrinate their particular dogma and fix their standards of acceptance, leading to a "ghetto" mentality.

Thus, there has been slow downgrading and virtual destruction of what had been the public schools in Holland. Though 79% of primary students attended public schools in 1860, about 3 in 4, the number fell to 60% in 1900, 55% in 1920, and 27% in 1950, about one in four.

The inevitable political competitive "log rolling" for funds also short-changed the public schools so that in 1969 only 19.6% of the total educational funds went to public schools compared to 80.4% for private and church schools. As in this country, each particular church school indoctrinates its religious dogma, and this permeates all courses of the curriculum, including extremely biased views of history and culture.

This Court has recognized that tax dodges such as tax deductions or credits for parents of private and church school children lead inevitably to the dangers history poses, and to the creation of emotional divisiveness among the electorate. *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). As the Court said at page 793 in striking down a New York statute granting tax credits, called in the statute a "deduction":

> "Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions."

II. EVEN THOUGH THE MINNESOTA STATUTE GRANTS A TUITION DEDUCTION TO "ALL" STATE TAXPAYERS THIS DOES NOT CURE THE SAID EVILS. FURTHERMORE, THE FACT THAT IT PROVIDES FOR A 150% OR MORE INCREASE IN THE DEDUCTION ILLUSTRATES AGAIN THE VICE OF PROVIDING INDIRECT GOVERNMENTAL AID TO PRIVATE AND CHURCH SCHOOLS, OF HOWEVER LONG-STANDING.

Respondents contend that in providing for a tuition tax deduction to all Minnesota taxpayers, the aid so provided to parents of private and church school students becomes too remote to bring the statute within the proscription of the *Nyquist* case. They contend further that since the deduction has withstood local constitutional attack for some years, it has acquired some sort of constitutional immunity. We contend the contrary.

It is obvious that in the vast majority of cases this tuition deduction can be available only to parents of private and church schools of these, the vast majority are church schools. The public schools are *free* institutions. Public schools ordinarily do not charge tuition. This ob-

vious fact was recognized in *Rhode Island Federation of Teachers* v. *Norberg*, 630 F.2d 855, 861:

> ". . . the district court's finding here that the overwhelming majority of the parents eligible for the tuition deduction send their children to sectarian schools denies the tuition deduction the protection of *Walz*, and places it, as the district court found, within the proscription of *Nyquist*."

Another fact is obvious. The deduction works to remove from the public treasury monies which otherwise could and should go to public education, while at the same time enhancing the financial status of private and church schools. This bodes down grading or disaster for the free public school system, its aims and purposes, in two main respects.

First, the financial plight of the public schools is a matter of general knowledge. We have seen instances where local boards literally have run out of money, forcing the closing of schools. Every year the battles over local school budgets make newspaper headlines. Thus, it makes no financial sense to remove through tax credits or deductions further monies from the public treasury which otherwise could be used to help the financial distress of the public schools.

Second, it is also obvious that the tuition tax credit or deduction becomes useful only to those citizens who have sufficient gross income to pay income taxes. Thus, the middle and upper classes alone benefit. The inevitable result is an exodus from public schools of the children of those classes and their enrollment in private and church schools. Such class and, presumably, racial segregation, is directly contrary to the cornerstone principles of the free public school system as Justices Brennan and Frankfurter detailed, *supra*.

Furthermore, the New York and Holland experiences referred to above show that government aid causes not merely the attractiveness of attendance at *existing* private

and church schools but results in a proliferation of church schools. Also, since state and federal grants to public school boards are computed upon attendance, such an exodus means even less monies for public education. The credit or deduction thus becomes a two-bladed sword slashing at the very financial well-being of the public school system.

Nothing could better illustrate the evils of this type of indirect aid to private church schools than the history of the Minnesota statute itself. What was once a modest tax deduction has been increased about 150%. This brings to mind what this Court said in *Nyquist* at page 797:

> "But we know from long experience with both Federal and State Governments that aid programs of *any* kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases." (Emphasis added)

This Court should bring to a halt the continual sectarian clamor for *public* funds and under whatever guise. The wit of man cannot mask the illegality. Such church pressure is contrary to our basic principles of separation of church and state as applied to public schools, all as established in a long line of cases, and as Justices Brennan and Franfurter and many others noted.

There can be no doubt, as held in *Nyquist*, that the purpose of this clamor is religious. The prime purpose of a church school is to foster its particular faith and to indoctrinate its particular dogma on the attending children. "Give me a child till he is five and I'll have him for life." Some churches reject the American ideal of religious freedom for all creeds and struggle to make their religion compulsory as the only "true" one, and for that reason conduct their own separate schools. This becomes even more dangerous as such religions have invaded the socio-politico-judicial sphere, *e.g.*, the Roman

Catholic pressures of their dogmas against abortion and divorce, among other things, and the attempt to lobby the federal courts by sending briefs to all their law clerks on the very subject of this case, and in advance of litigation. This alone demonstrates the wisdom of the "entanglement" prohibition.

Furthermore, a school under religious control segregates its children along sectarian lines, as opposed to the public school which is an American melting pot for a unified and enlightened citizenry. Some church school texts and teachers even inveigh against other faiths, forbidding their children to join other organizations and who, under church dogma, are bound to shun other groups. In a public school, the citizens themselves at local levels control curricula and inculcate American principles, including liberty and equality.

Finally, even though in the courts below the Minnesota tuition tax deduction guise may have been upheld in the past, still its dramatic new increases leading to this litigation makes even more pertinent the words of the Court in *Walz* v. *Tax Commission*, 397 U.S. 664, at 678:

> "But historical acceptance without more would not alone have sufficed, as 'no one acquires a vested or protected right in violation of the Constitution by long use."

CONCLUSION

Based upon the holdings of *Nyquist* and for all the reasons foregoing, the Minnesota tax deduction violated the Establishment Clause of the First Amendment. It would cripple our free American public school system, which must be supported and preserved.

Respectfully submitted,

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Dated: December 3, 1982

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MOTION FILED
FEB 1 1983

No. 82-195

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER and JUNE NOYES
Petitioners,

v.

CLYDE E. ALLEN, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF UNITED STATES CATHOLIC CONFERENCE *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The United States Catholic Conference ("USCC") respectfully moves this Court for leave to file a brief *amicus curiae* in support of Respondents in this case. Through their counsel, Respondents Clyde E. Allen and Brenda B. Becker, *et al.*, have indicated that they neither refuse nor consent to appearance of *amici*, thereby necessitating this motion. The consents of counsel for the Petitioners, and the Respondents Dennis J. Berthiaume, *et al.*, have been obtained.

The USCC is the civil agency of the Catholic Bishops in the United States. Its programs embrace the areas of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, and communications and public affairs, with emphasis on the preservation of religious liberty in America.

This case raises the important question of whether the Establishment Clause prevents a state from allowing an in-

come tax deduction for educational expenses incurred by parents of children attending public and private schools, because some of those children attend religious or church-related schools.

This *amicus* believes (a) that resolution of the issues may be served by critical philological and historical analysis grounded in the legislative history of the Religion Clauses in the First Congress, and (b) that such an analysis will enhance the application of the principles presently at work in the cases. It is believed that the parties will not deal sufficiently with this aspect of the issues.

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Public Funds for Public Schools v. *Byrne*, 590 F.2d 514 (3d Cir. 1979) *aff'd mem.*, 442 U.S. 907 (1979) ... 5

Reynolds v. *United States*, 98 U.S. 145 (1879) 16, 20

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School District of Abington Township v. *Schempp*, 374 U.S. 203 (1963) 21, 25

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1 *Annals of Congress* (Gales & Seaton eds. 1789) .. *passim*
C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment* (1963) 14, 15
W. Berns, *The First Amendment and the Future of American Democracy* (1976) 11
Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Review 673 (1980) 5
R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982) 20
I. Cornelison, *The Relation of Religion to Civil Government in The United States of America* (1895) 19
Corwin, *The Supreme Court as National School Board*, 14 Law and Contemporary Problems 3 (1949) 8, 12, 19, 23
Debates on the Adoption of the Federal Constitution (2d ed. J. Elliott ed. 1836) 7, 8, 18
Documentary History of the First Federal Congress of The United States (L. DePauw ed. 1972) 13
Journal of the Senate of the Commonwealth of Virginia, 1785-1790 (1828) 18
Letter from The Ursulines of New Orleans to Thomas Jefferson (March 21, 1804) 21, 3a
Letter from Thomas Jefferson to The Ursulines of New Orleans (May 15, 1804) 21 1a

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M. Malbin, *Religion and Politics—The Intention of the Authors of The First Amendment* (1978) ... 11, 23, 24

National Archives and Records Service, *The Story of the Bill of Rights* (1980) 11

Sources and Documents Illustrating the American Revolution 1764-1788 (2d ed. S. Morison ed. 1929) 15

A. Stokes, *Church and State in the United States* (1950) 12, 15, 20, 21

J. Story, *Commentaries on the Constitution of the United States* (1833) 23

Wilson, *The School Aid Decisions: A Chronicle of Dashed Expectations*, 3 Journal of Law and Education 101 (1974) 5

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On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is a non-profit membership corporation composed of all the Catholic Bishops in the United States. The programs of the USCC include the areas of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, youth activities, and communications, with emphasis on the preservation of religious liberty. When deemed appropriate and permitted by court rules or practice, the USCC offers its views in litigation touching important socio-moral and other issues pertinent to its areas of activity, particularly when they may affect the Catholic Church or its people in the United States.

The United States Court of Appeals for the Eighth Circuit has held that a Minnesota statute authorizing a limited income tax deduction for Minnesota taxpayers for certain school-related expenses does not violate the Establishment Clause of

the First Amendment. The statute benefits all eligible parents, regardless of religious beliefs, or the school attended by their children, public or private, church-related or not. A reversal of the decision of the Court of Appeals would adversely affect parents of school age children, Catholic as well as others, by increasing their tax burdens.

SUMMARY OF ARGUMENT

The Minnesota statute is constitutionally benign and clearly sustainable tax legislation under the applicable decisions of this Court. This *amicus* will not duplicate the Respondents' analysis demonstrating the correctness of that conclusion. Rather, it will endeavor to serve the Court by presenting a fresh historical and philological analysis of the Establishment Clause which renders the "primary effect" component of the Three-Part Test more workable by rooting it firmly in Establishment Clause objectives.

The House and Senate proceedings which forged the language of the Establishment Clause demonstrate, as Madison himself explained, that the objective was to forbid the establishment or preferment of one or more religions. History had taught the founders that such conditions lead to infringement of religious liberty. Although the House and Senate proceedings do not address the details of permissible interaction between church and state, colonial history demonstrates the need for a buffer zone of impermissible interaction to avoid a concrete and intolerable risk of eventual establishment or preferment.

The Court has drawn on colonial experience in recognizing that the public purse can be an instrument of establishment or preferment. Hence, it has carefully examined legislation which benefits churches and other religious groups, including in relation to educational programs. Although such care is doubtless appropriate, the constitutional vision has been somewhat distorted as a result of a skewed historical perspective in the seminal cases, notably *Everson* v. *Board of Education*, 330 U.S. 1 (1947).

According no consideration to the House and Senate proceedings, *Everson* attached overriding significance to the disestablishment history of Virginia, in particular Madison's Memorial and Remonstrance opposing a bill in the Virginia Assembly to impose a tax for the support of ministers. Thus influenced, the *Everson* opinion pronounced broadly against aid to religion, putting it almost on a judicial par with establishment and preferment themselves. Although the Court has cautioned against undue reliance on the *Everson* dicta, and pursued the common sense course of benevolent neutrality, *Everson's* conclusions are enduring obstacles to an Establishment Clause analysis rooted in the objectives the Religion Clauses were meant to serve.

When the Religion Clauses were being forged, there was a wide diversity of views and practices among the states with respect to church-state relations. These were reflected in the House and Senate proceedings. The words of the Establishment Clause represented a compromise between the versions finally approved by House and Senate. Analysis of those proceedings illumines those words to the point of undeniable precision in their thrust. The Establishment Clause was meant to lay down a principle. Its explicit proscriptions against establishment and preferment constitute the precise judgment of the framers. They did not explicitly or impliedly classify aid to churches or religious groups as inherently objectionable, hardly surprising given the diverse values and practices of the day. Instead, and typically, they left the development of prudential subsidiary principles for the future.

The Court's recent cases make clear that the contours of Establishment Clause analysis are still evolving and are amenable to enhancement. This *amicus* respectfully suggests that the subsidiary principles which determine the zone of impermissible interaction between church and state should derive their substance and direction more concretely from the explicit Establishment Clause objectives. Requiring a clearer and more concrete relationship between a particular law and those objectives would provide a stability of principle which would

greatly enhance the analytical process of applying the "primary effect" component of the Three-Part Test. Rooted in the reliable soil of precise legislative history, and generally guided by colonial experience, such an adjustment in emphasis would provide a more hospitable philosophical and analytical environment for the common sense principle of benevolent neutrality. It would provide needed relief from the subtle, inhospitable cross-currents yet in motion as a result of *Everson*.

This *amicus* does not propose a test, but rather an approach to guide decision. To do more would be presumptuous and unnecessary, particularly in this case which involves a statute which should survive the strictest demands of the decided cases.

ARGUMENT

I.

THE GENERATIVE HISTORY WHICH FORGED THE WORDS OF THE ESTABLISHMENT CLAUSE PROVIDES A BASIS FOR ENHANCING THE ANALYTICAL FRAMEWORK OF ESTABLISHMENT CLAUSE AID CASES

Petitioners challenge the constitutionality of the Minnesota statute[1] on the ground that it is a law "respecting an establishment of religion" in violation of the First Amendment.[2] Thus, religion has been thrust into a matter involving a state's tax policy which does not pose the remotest threat to authentic constitutional values. The statute is benign and easily withstands a principled application of this Court's decisions construing and applying the Establishment Clause. The Court of Appeals should be affirmed (discussed below at 29-30).

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[1] Minn. Stat. Ann. § 290.09, subd. 22 (West Supp. 1982).

[2] U.S. Const. amend. I provides in relevant part that "Congress shall make no law respecting an establishment of religion . . . ."

A. PURPOSE OF THIS *AMICUS*

It is generally agreed that the "Three Part-Test"[3] for assessing the validity of legislation under the Establishment Clause has not proven entirely satisfactory. Both Bench[4] and Bar[5], as well as the executive and legislative and branches,[6] have encountered acute difficulties in applying this analytical framework. The Court itself has recognized the difficulties, acknowledging that the diminished predictability of decision caused by a flexibility of approach "promises to be the case until the continuing interaction between the courts and the States . . . produces a single, more encompassing construction of the Establishment Clause." *Committee for Public Education, Etc.* v. *Regan*, 444 U.S. 646, 662 (1980). Clearly, the contours of analysis are in process and open to enhancement.

Consistent with its admonitions in other contexts,[7] the Court has warned against the mechanical application of the Three-

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[3] Under the precedents of this Court, a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion. *Committee for Public Education, Etc.* v. *Regan*, 444 U.S. 646, 653 (1980).

[4] *Public Funds for Public Schools* v. *Byrne*, 590 F.2d 514, 521 (3d Cir. 1979) (Weis, J., concurring), *aff'd mem.*, 442 U.S. 907 (1979).

[5] Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980).

[6] The seemingly anomalous results under the Three-Part Test create a practical dilemma for those who must shape and administer public policy, in fidelity to the Constitution as propounded by this Court. *See* Wilson, *The School Aid Decisions: A Chronicle of Dashed Expectations*, 3 Journal of Law and Education 101 (1974). What is a *reviewable* misunderstanding of constitutional principle in the judicial process can operate as an unwarranted and mischievous restraint upon legislative and executive judgment, with protracted social effects.

[7] *See American Communications Association* v. *Douds*, 339 U.S. 382, 394 (1950); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

Part Test: "[T]he tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."[8] As the Chief Justice counseled in *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970), the overriding policy of benevolent neutrality requires a value judgment as to whether a particular law offends the objective and principles of the Establishment Clause. *See also Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 761 (1973). That was the measure by which the court below ultimately assessed its application of the Three-Part Test. *Mueller* v. *Allen*, 676 F.2d 1195, 1206 (1982).

Mindful of the limited historical analysis in the seminal cases (discussed below), this *amicus* respectfully suggests that the arduous experience of the intervening years justifies a critical reassessment of the historical underpinnings of the Religion Clauses. Within the framework of the essential principles at work in the cases, there is sound basis for enhancing the "primary effect" component of the Three-Part Test. This *amicus* presents a historical and philological analysis which should serve the Court by rooting the primary effect test more firmly in the authentic Establishment Clause objectives.

B. "GENERATIVE HISTORY" OF RELIGION CLAUSES

The history of religious strife and persecution predating the Constitution has been recounted often in the opinions of the Court. *See Everson* v. *Board of Education*, 330 U.S. at 8-11; *Engel* v. *Vitale*, 370 U.S. 421, 425-30 (1962). At the time, there was diversity of view and practice among the states regarding established religion. That diversity is discussed below at 14-16.

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[8] *Meek* v. *Pittenger*, 421 U.S. 349, 359 (1975); *cf. Tilton* v. *Richardson*, 403 U.S. 672, 677-78 (1971).

The history which is most germane to the meaning of the Religion Clauses is the process of their evolution in the First Congress and the ensuing ratification process. Yet, because they were a product of reaction to the Constitution itself, it is necessary to begin at that threshold.

1. Constitutional Convention Of 1787 And Ratification By States

Religion was not a major concern of the Constitutional Convention of 1787. The only reference to religion in the proposed Constitution appeared in Article VI which provided, in part, that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[9]

During the ratification process some states expressed concern because the Constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia[10] specifically addressed the issue of religious freedom. The ratifying acts of four of them (New Hampshire excepted) addressed the issue of an established religion in terms of preferring one religion over others. Virginia proposed the following amendment on June 27, 1788:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of

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[9] *V Debates on the Adoption of the Federal Constitution* 564 (2d ed. J. Elliot ed. 1836).

[10] Of these states Rhode Island and New York did not make a recommendation for a religious amendment but each did include in its ratifying act a declaration of principles which included statements on religious liberty. *See* notes 12 and 13 *infra*.

conscience, and *that no particular religious sect or society ought to be favored or established, by law, in preference to others.*[11] (Emphasis added.)

The scored language appeared in virtually identical form in the ratifying acts of New York,[12] Rhode Island,[13] and North Carolina.[14] Desirous of protecting its own religious establishment,[15] New Hampshire proposed an amendment reading: "Congress shall make no laws touching religion, or to infringe the rights of conscience."[16]

In contrast, there was substantial opinion that the explicit protection of religious liberty was unnecessary because the federal government lacked authority over religion, and because adequate protection was supplied by the ban on religious tests in Article VI and by the multiplicity of sects in the country. James Madison was among those who shared this view.[17]

2. Textual Development Of The Religion Clauses

The wording of the Religion Clauses was a compromise between the different texts finally approved by the House and Senate. The Religion Clauses evolved as follows:

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[11] III Elliot, *supra* note 9, at 659.

[12] I *id.* at 328.

[13] *Id.* at 334.

[14] IV *id.* at 244.

[15] *See* Corwin, *The Supreme Court As National School Board*, 14 Law and Contemporary Problems, 3, 11 (1949). New Hampshire's constitution on the date it ratified the Constitution contained a provision under which the legislature could authorize towns, corporate bodies, or religious societies to make provision at their own expense for the support and maintenance of public Protestant teachers of piety, religion and morality. N.H. Const. of 1784, Pt. I, Art. I, Section VI, 4 *American Charters, Constitutions and Organic Laws*— 1492-1908, 2454 (F. Thorpe ed. 1909).

[16] I Elliot, *supra* note 9, at 326.

[17] III *id.* at 330.

HOUSE LANGUAGE

Madison's Proposal — June 8

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

Select Committee — July 18

No religion shall be established by law, nor shall the equal rights of conscience be infringed.

Livermore's Language — August 15

Congress shall make no laws touching religion, or infringing the rights of conscience.

Ames Language — August 20

Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.

Final Text — August 24

Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

SENATE LANGUAGE

September 3

Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.

Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.

Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

Congress shall make no law establishing religion or prohibiting the free exercise thereof.

Final Text — September 9

Congress shall make no law establishing articles of faith or mode of worship or prohibiting the free exercise of religion . . . .

COMPROMISE

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof
>
> . . . .

Nothing in the House and Senate proceedings suggests that the thrust of the compromise differed in any material degree from the final House and Senate versions. It was directed against the preferment or establishment of religion.

3. The House Of Representatives

The major proceedings in the House took place on August 15, 1789, although final action did not occur until August 24th.

Madison Introduces First Version. The first version of the Religion Clauses was among a number of amendments to the Constitution proposed by Madison on June 8, 1789. It provided:

> The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

1 *Annals of Congress* 434 (Gales & Seaton eds. 1789) (emphasis added). He advised that many doubted amendments to the Constitution were necessary to secure individual liberty. *Id.* at 432. He also stated the amendments would "not injure the Constitution," *id.*, and were "likely to meet the concurrence [of the states] required by the Constitution." *Id.* at 433.

Select Committee's Version. The amendments were referred to a Select Committee. Because of the diversity of views on religious liberty among the states, it is important to note the Committee consisted of one representative (including Madison) from each state. *Id.* at 665. The Committee reported language similar to that proposed by Madison regarding establishing religion except that the word "national" had been

deleted.[18] Deletion of that word reflected a concern that the new government might be viewed as national rather than federal, with authority over state practices beyond its enumerated powers (discussed below at 23).

Madison Explains Intent. On August 15th the House considered the amendment reported by the Select Committee. Madison explained its meaning to be "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals* at 730. He also observed that the amendment had been required by some state conventions which feared the Constitution might have given the Congress authority to make laws that "might infringe the rights of conscience and establish a national religion; to prevent these effects he presumed the amendment was intended." *Id.*

Concern Amendment Might Harm Religion. The language of the Select Committee's proposal ("No religion shall be established by law . . . .") evoked limited concern that it might be construed adversely to religion. Peter Sylvester of New York suggested the wording of the amendment "might be thought to have a tendency to abolish religion altogether." *Id.* at 729.[19] Benjamin Huntington of Connecticut agreed with Madison's statement of the intent, but he also expressed concern "that the words might be taken in such latitude as to be extremely harmful to the cause of religion." 1 *Annals* at 730. To illustrate, Huntington suggested the inability of a federal court to compel persons to support the religious societies to which they belonged, "for a support of ministers, or building of places of worship might be construed into a religious establishment."

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[18] National Archives and Records Service, *The Story of the Bill of Rights* 6 (1980).

[19] At least two commentators have concluded that Sylvester thought the language might be interpreted as forbidding all governmental assistance to religion. *See* W. Berns, *The First Amendment and the Future of American Democracy* 8 (1976); M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment* 7 (1978).

Id. At the time, Connecticut authorized religious societies to tax their members for support.[20]

Madison Restates Intent. To assuage concerns such as those expressed by Sylvester and Huntington, Madison moved to insert the word "national" before religion which he thought "would point the amendment directly to the object it was intended to prevent." 1 *Annals* at 731. He "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.*

Samuel Livermore of New Hamshire was not satisfied with Madison's motion but did not elaborate on his objections. *Id.* Elbridge Gerry of Massachusetts also objected to the insertion of the word "national." Gerry's discussion reflected concerns expressed by opponents of the Constitution in state ratifying conventions that the Constitution established a national government rather than a federal government. *Id.* Madison withdrew his motion, but denied insertion of the word "national" would imply the government was a national one. *Id.*[21]

Livermore's Amendment. Livermore moved to amend the language to read "that Congress shall make no laws touching religion, or infringing the rights of conscience." 1 *Annals* at 731. This proposal is identical, except for a stylistic change, to that recommended by New Hampshire when it ratified the Constitution, above at 8, and can be attributed to a desire to protect her own religious establishment.[22] Livermore's proposal, which passed on August 15 without any recorded debate, was not the language finally adopted by the House.

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[20] *See* I A. Stokes, *Church and State in the United States* 411-12 (1950).

[21] In the course of debate, Gerry had suggested that the amendment would "read better if it was that no religious doctrine shall be established by law." I *Annals* at 730. Roger Sherman of Connecticut thought the amendment unnecessary because Congress had no authority whatever delegated by the Constitution to make religious establishments. *Id.* Daniel Carroll of Maryland was in favor of the amendment because it would tend to conciliate the minds of those who felt the rights of conscience were not well secured under the Constitution. *Id.*

[22] Corwin, *supra* note 15.

Final House Text. On August 20th the House passed the motion of Fisher Ames of Massachusetts (the last state to abandon an established religion in 1833) to change the wording to "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." 1 *Annals* at 765. With minor stylistic changes, it was ultimately sent to the Senate on August 24th. *Id.* at 778. The *Annals of Congress* do not record the debate, if any, on the Ames wording.

Insofar as establishment is concerned, the Ames and House versions are indistinguishable in substance from that proposed by the Select Committee. Madison's explanations of intent give importance to this fact.

4. The Senate

On September 3rd the Senate twice agreed to amend the language approved by the House. First, it approved this language: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed."[23] The Senate then rejected two other versions of the amendment[24] and a motion that the entire amendment be stricken. I DePauw, *supra* note 23, at 151. The Senate finally approved: "Congress shall make no law establishing religion or prohibiting the free exercise thereof." *Id.*

On September 9th the Senate passed its final version, to which it added other guarantees of liberty (free speech, free press, peaceable assembly and petition). The Religion Clauses read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . . ." *Id.* at 166. There are no records of the debates in the Senate.

[23] I *Documentary History of the First Federal Congress of the United States* 151 (L. DePauw ed. 1972).

[24] The rejected versions were (i) "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society," and (ii) "Congress shall make no law establishing any particular denomina-

5. Ratification By The States

The Bill of Rights was ratified by the states with a notable lack of comment on the First Amendment.[25] Only in the Virginia Senate was concern expressed that the First Amendment was not broad enough to prevent preferential treatment among religions (discussed below at 18).

C. DIVERSITY OF RELIGIOUS PRACTICES AMONG THE STATES—VIRGINIA ATYPICAL

The Religion Clauses were molded to meet the needs and wishes not only of the people of Virginia, but of all the states. Their views and sentiments on the appropriate relation of government to religion varied greatly. The undue influence of Virginia's disestablishment history on Establishment Clause law (discussed below at 16-21) requires a sharp focus on the great diversity of religious practice among the states.

The panorama of opinion on church-state relations found expression in the laws of the states, as succintly catalogued by Sanford H. Cobb:

> Two out of thirteen, Virginia and Rhode Island, conceded full freedom; [o]ne, New York, gave full freedom except for requiring naturalized citizens to abjure foreign allegiance and subjection in all matters ecclesiastical and civil; [s]ix, New Hampshire, Connecticut, New Jersey, Georgia, North and South Carolina, adhered to religious establishment; [t]wo, Delaware and Maryland, demanded christianity; [f]our, Pennsylvania, Delaware, North and South Carolina, required assent to the divine inspiration of the Bible; [t]wo, Pennsylvania and South Carolina, imposed a belief in heaven and hell; [t]hree, New York, Maryland, and South Carolina, excluded ministers from civil office; [t]wo, Pennsylvania and South Carolina, emphasized belief in one eternal God; [o]ne, Delaware, required assent to the doctrine of the Trinity; [f]ive, New

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tion of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.*

[25] C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment* 157 (1963).

> Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, insisted on Protestantism; [o]ne, South Carolina, still referred to religious 'toleration'.[26]

In their practices as well, states varied. For instance, while Virginia prohibited obligatory support of any religious place or ministry,[27] states such as Connecticut, Maryland, New Jersey, North Carolina, Pennsylvania, and Georgia recognized a right to refrain from taxation for the support of a church other than one's own, but permitted taxation for the support of a church which one had joined.[28] Massachusetts and New Hampshire empowered the legislatures to authorize towns and religious societies to provide for the support of public Protestant teachers of piety, religion, and morality, although certificates of dissent directing tax support to one's own church were permitted to be filed.[29]

Virginia opposed incorporation of churches, while Delaware, New Jersey, and Pennsylvania permitted incorporation. Maryland permitted incorporation but was reluctant to grant corporate status in practice. South Carolina opposed incorporation for dissenting churches. New Hampshire approved incorporation for all, but in practice favored the Congregational church.[30]

It thus is evident that the great number of people who ratified the First Amendment in the states did not share a church-state tradition in common with Virginia or each other. Rather, the experience of Virginia was unique to most early Americans. It cannot reasonably be presumed to have been the desired prototype of a people who with deliberation selected

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[26] I A. Stokes, *supra* note 20, at 444, citing S. Cobb, *The Rise of Religious Liberty in America* 507 (1902).

[27] *Sources and Documents Illustrating the American Revolution* 207 (2d ed. S. Morison ed. 1929).

[28] Antieau, *supra* note 25, at 36-38.

[29] I Stokes, *supra* note 20, at 424, 429.

[30] Antieau, *supra* note 25, at 82-86.

very different models of church-state accommodation. The First Amendment, ratified by representatives and conventions of eleven states, was the product of all these models.

D. THE UNDUE INFLUENCE OF VIRGINIA'S HISTORY UNDER *EVERSON*

The interpretative importance of the generative history of the Establishment Clause was effectively blunted by its omission from consideration in *Everson*, the very threshold of Establishment Clause analysis.

The briefs in *Everson* did not treat the House and Senate proceedings. The principal historical discussion is found in the brief filed by the American Civil Liberties Union which concentrated on Virginia disestablishment history as it was recounted in the early free exercise polygamy case of *Reynolds* v. *United States*, 98 U.S. 145 (1879). Drawing on *Reynolds*, *Everson* tied its conclusions to Virginia history as it is revealed by the Virginia Bill for Religious Liberty, Madison's "Memorial and Remonstrance Against Religious Assessments," and Jefferson's "wall of separation" letter to the Danbury Baptists. The overriding importance attached to this history has been noted in subsequent cases.[31]

Everson's sweeping assertions against aid to religion, restated a year later in *McCollum* v. *Board of Education*, 333 U.S. 203, 210-11 (1948), have since been qualified. *See Walz* v. *Tax Commission*, 397 U.S. at 668; *Board of Education* v. *Allen*, 392 U.S. 236, 250-51 (1968) (Black, J., dissenting). However, they severely restricted the interpretative value of the precise generative history when it was discussed fourteen years later in *McGowan* v. *Maryland*, 366 U.S. 420, 440-42

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[31] *See Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. at 770; *Braunfeld* v. *Brown*, 366 U.S. 599, 602 (1961); *McGowan* v. *Maryland*, 366 U.S. 420, 437 (1961).

(1961). Although that history was fully briefed in *McCollum*,[32] it was not discussed in the majority opinion by Justice Black who had also authored the *Everson* opinion.

Although the Virginia experience is assuredly a relevant part of a balanced historical analysis, it has unduly influenced analysis in Establishment Clause cases. The *Everson* opinion could have given more effect to its observation (330 U.S. at 11) that the meaning of the Religion Clauses cannot be derived solely from the experience of any one colonial group or locale. The discussion which follows further assesses the probative value of Virginia history.

1. Virginia Bill For Religious Liberty.

Everson suggested that the Religion Clauses were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Bill for Religious Liberty enacted in 1786 ("Virginia Bill"). *Everson* v. *Board of Education*, 330 U.S. at 13. However, the operative language of the Virginia Bill reveals the difficulty with this view:

> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . .

Id. This Bill differed greatly (a) from that which Virginia recommended two years later as an amendment to the Constitution, (b) from that which Madison proposed, and (c) from that which was finally included in the Establishment Clause. The history already discussed makes clear that a number of states would not have agreed to an amendment with the breadth of the Virginia Bill.

To the extent Virginia's estimate of *federal* establishment needs is relevant, no source is more conclusive than the amend-

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[32] Brief for Appellees, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

ment it proposed when it ratified the Constitution. Quoted in full above at 7-8, it bears restatement here:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and *that no particular religious sect or society ought to be favored or established, by law, in preference to others.*[33] (Emphasis added.)

Virginia appreciated the very real difference between attending to its own concerns, and those of the federal government in its relations with all the states.

Finally, although its concerns seem unfounded in retrospect, on December 12, 1789 the Virginia Senate expressed grave disappointment over the First Amendement (then the third). Its recorded sentiments concluded that, in all respects including the Religion Clauses, the First Amendment "will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia."[34] The eleventh and last state necessary for ratification, Virginia postponed its acceptance until December 15, 1791, two years later.

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[33] III Elliot, *supra* note 9, at 659.

[34] The 3d amendment, recommended by Congress does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in the process of time render it as powerful and dangerous as if it was established as the national religion of the country.

This amendment then, when considered as it relates to any of the rights it is pretended to secure, will be found totally inadequate, and *betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia* and other states, for the protection of these rights. Journal of the Senate of the Commonwealth of Virginia, 1785-1790, at 62-63 (1828) (emphasis added).

The point here is not substantive, but only that it is imprecise to consider the Religion Clauses as the embodiment of the spirit and accent of the Virginia Bill.

2. Madison's Memorial And Remonstrance Against Religious Assessments

Madison's Memorial must be assessed in context. It was written four years before the Religion Clauses were hammered out. His purpose was to oppose A Bill Establishing A Provision for Teachers of the Christian Religion ("Bill") pending before the Virginia Assembly.[35] It was "an impassioned reaction," *Flast* v. *Cohen*, 392 U.S. 83, 104 n.24 (1968), to a bill intended to impose a tax for the support of ministers at a time when Virginia was in the last stages of established Anglicanism. The Memorial itself indicates that Madison's concept of an established religion was one that enjoyed a preferred status and to which others might be obliged to conform.[36] Madison's opposition to the Bill accords with his stated understanding of the meaning of the Establishment Clause, discussed above at 11-12. It would seem futile to attempt to contradict or vary that understanding by reference to his Memorial.

As demonstrated, the Religion Clauses were the result of a political process which, typically, produced compromise. The Memorial cannot be considered as Establishment Clause bedrock anymore than the Virginia Bill can be so viewed.

3. Wall Of Separation - Jefferson's Metaphor

Thomas Jefferson was in France when the Religion Clauses were developed, debated and adopted.[37] Thirteen years later he employed the "wall of separation" metaphor when he declined a request of the Danbury Baptist Association to pro-

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[35] Both the Bill and Madison's Memorial are appended to Justice Rutledge's dissenting opinion in *Everson*, 330 U.S. at 63-74.

[36] *See* Corwin, *supra* note 15, at 10.

[37] I. Cornelison, *The Relation of Religion to Civil Government in The United States* 93-94 (1895).

claim a day of fast and prayer in thanksgiving.[38] His refusal may be contrasted with President Washington's proclamation of a day of public thanksgiving and prayer,[39] pursuant to the House's resolution one day after Congress approved the text of the Religion Clauses, 1 *Annals* at 914-15, and with this Court's views in *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). Like Madison's Memorial, Jefferson's metaphor should not be put in service of objectives beyond its purpose and intent. The principle he was expounding was government's lack of authority over religious practice or belief. *Reynolds* v. *United States*, 98 U.S. at 164. The hazard of undue reliance on Jefferson's metaphor becomes more apparent when it is considered in light of his demonstrated church-state philosophy.

In 1803, Jefferson submitted for Senate approval a treaty with the Kaskaskia Indians that provided for an annual payment, for seven years, of one hundred dollars for the support of a Catholic priest and a single payment of three hundred dollars to assist in the building of a church.[40] On three occasions Jefferson extended a 1796 act which had authorized the issuance of patents, without payment, for three tracts of land to the Society of the United Brethren for propagating the Gospel among the Heathen.[41] Jefferson was President when tax exemption was first given churches in Washington by Congress. *Walz* v. *Tax Commission*, 397 U.S. at 684 (Brennan, J., concurring). Jefferson had recommended that the various religious sects be allowed to establish schools of theology on the confines of Virginia's public university.[42] Finally, on May 15, 1804, Jeffer-

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[38] "I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." *Reynolds* v. *United States*, 98 U.S. at 164.

[39] *See* I Stokes, *supra* note 20, at 437-88.

[40] R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 261-63 (1982).

[41] *Id.* at 41-46.

[42] *See McCollum*, 333 U.S. at 245-46 (Reed, J., dissenting).

son wrote to The Ursulines of New Orleans, a Catholic religious order of nuns. Responding to their request for assurance of the continued operation of an orphanage, President Jefferson stated: "[T]he charitable objects of your institution cannot be indifferent to any; and it's [*sic*] furtherance of the wholesome purposes of society, by training of it's [*sic*] younger members in the way they should go, cannot fail to ensure it the patronage of the government it is under. Be assured it will meet all the protection which my office can give it."[43] The texts of Jefferson's and The Ursulines' letters are appended.

If one should look to Jefferson, his actions are far more meaningful than his metaphor.

E. ESTABLISHMENT CLAUSE ANALYSIS WITHIN FRAMEWORK OF ESSENTIAL JUDICIAL PRINCIPLES AND GERMANE HISTORY

Before undertaking the necessary analysis, it is useful to establish the essential contours of the decisional context which it is meant to serve.

The Fourteenth Amendment makes the Religion Clauses applicable to the states. *Everson* v. *Board of Education*, 330 U.S. at 8. Although the "clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another," *Larson* v. *Valente*, 102 S.Ct. 1673, 1683 (1982), its reach embraces certain acts and practices which do not themselves constitute a formal establishment or preferment of a religion or religions. *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 216 (1963); *McGowan* v. *Maryland*, 366 U.S. at 442; *Everson* v. *Board of Education*, 330 U.S. at 15-16. Yet an hermetic separation of church and state is not required. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 746 (1976); *Lemon* v. *Kurtzman*, 403 U.S. 602, 614

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[43] *See* I Stokes, *supra* note 20, at 677. The original of Jefferson's letter is located in the archives of the Ursuline Academy, 2635 State Street, New Orleans, Louisiana, 70118.

(1971). There is ample room in society for government's benevolent accomomodation of religion which "derives from an accommodation of the Establishment and Free Exercise Clauses." *Walz* v. *Tax Commission*, 397 U.S. at 669-70. That benevolence may not go so far as to jeopardize the fundamental objectives of the Establishment Clause, but there is no transgression merely because aid may free the recipient "to spend its other resources on religious ends." *Committee for Public Education, Etc.* v. *Regan*, 444 U.S. at 658; *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973); *see also Roemer* v. *Board of Public Works*, 426 U.S. at 747.

For present analytical purposes, there is no more useful framework than this statement of the Chief Justice in *Walz:*

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

397 U.S. at 669. This states precisely the two levels of operative principle, namely, the immutable and inviolable constitutional precepts against establishment or preferment, and ancillary principles whose implication is necessary to preserve those precepts. The principles which determine the zone of impermissible governmental action should derive their substance from the explicit Establishment Clause objectives.

1. Establishment Clause Language

Whatever may be said of the clarity of the Establishment Clause considered *in vacuo*, its precise meaning emerges when the words are illumined by the process which forged them. The language purposefully and precisely effectuates the readily identifiable objectives of its framers. Had the Establishment segment of the Religion Clauses emerged in the versions previously considered in House and Senate, there would be no doubt that its objectives were the actual establishment or preference

of one or more religions. That was the precise concern of four of the five states which requested such an amendment when they ratified the Constitution. That was the precise objective stated and restated by Madison as sponsor in the House.

There was no tension or doubt related to these objectives, but the choice of words to reach them did engender certain anxieties born of other concerns. References to "national" religion evoked fears of an implication that the new government would be "national" and not "federal." However, more important for present purposes was the concern that the Religion Clauses might interfere with the autonomy of the states in religious matters, particularly the states which still countenanced preferred religion to one degree or another. Except for Madison, the most active participants in the House debate (Gerry, Huntington, and Livermore) came from states (Connecticut, Massachusetts, and New Hampshire) that maintained a religious establishment in one form or another. More than one commentator has noted the importance of the national-state issue to the development of the Establishment Clause.[44]

As noted, the Religion Clauses are a House-Senate compromise. The task was to agree on language that would meet the major objectives of the recommending states as described by Madison, but which would respect the concerns of his peers. The language finally selected accomplishes these objectives in a skillful manner and becomes quite unambiguous in light of the concrete realities. The phrase "respecting an establishment" had two jobs to do, *i.e.*, prevent Congress from establishing or favoring a national religion, and prevent Congress from interfering with state religious practices. It did both well, and only violence to its purpose can ensue if suggestions of basic ambiguity are allowed to force other basic objectives upon the Establishment Clause.

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[44] *See* Corwin, *supra* note 15, at 10; Malbin, *supra* note 19, at 17; J. Story, *Commentaries on the Constitution of the United States* 731 (1833).

The phrase "respecting an establishment" cannot reasonably be read to mean concerning or touching upon religion. Indeed, that was the terminology of Livermore's proposal which was eventually rejected. The word "establish," or its derivatives, was consistently used to refer to preferred religions in the amendments recommended by the states, by Madison in the House debate, and in versions of the measure in both House and Senate. There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to expand the meaning of "an establishment of religion" or the scope of the Clause. As noted, the use of "respecting" made clear that Congress was also prohibited from passing laws affecting state establishments.[45]

The language of the Clause does not concern itself with religion in general but with the particular problem of *an establishment* of religion. There was no concern expressed during the August 15 debate that Congress might enact a law beneficial to religion or religious institutions. Such benevolence was not perceived as an evil. Had this been the concern it could have been dealt with simply by providing that "Congress shall make no law respecting religion" without introducing the more limited concept of "an establishment of religion."

It has been observed that if the authors of the Establishment Clause intended only the objective of prohibiting preferred or established religion, they could have simply so provided rather than choose the language they did. *Lemon* v. *Kurtzman*, 403 U.S. at 612. However, as demonstrated, such terminology was rejected by the First Congress for the reasons assigned. This *amicus* respectfully submits that the Establishment Clause is clearer than as perceived in *McGowan*, 366 U.S. at 441-42, and a few other cases[46] under the influence of *Everson*.

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[45] Malbin, *supra* note 19, at 16.

[46] The language has been referred to as "opaque," *Lemon* v. *Kurtzman*, 403 U.S. at 612; and as "sparse," *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. at 820 (White, J., dissenting).

2. Establishment And Religious Liberty

The Establishment Clause is part of the Bill of Rights. The canon *ejusdem generis* suggests, and the history of the Religion Clauses requires, that the Establishment Clause be viewed as a means for protecting individual liberty. *See* Madison's explanation of intent, above at 11. Especially is this so under the Fourteenth Amendment which applies the Establishment Clause to the states. That Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious freedom.

The Establishment Clause has a functional relationship to religious liberty. As the Court has noted, it reflects the experience of its framers that officially preferred or established religion generates religious intolerance and persecution. *School District of Abington Township* v. *Schempp*, 374 U.S. at 221-22; *Engel* v. *Vitale*, 370 U.S. at 430-32; *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961). Both components of the Religion Clauses were meant to work to the same end. If the Establishment component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities of religious institutions which serve the public interest and which pose not the remotest threat to religious freedom.

3. Analytical Impact Of Everson

To the precise objectives of the Establishment Clause, the opinion in *Everson* engrafted a third couched in terms of aid to religion. This is the root of the difficulty, for by so doing this mode of governmental accommodation was rendered opprobrious and was reduced to the level of inherent constitutional vice. The abiding effect is the anguished tension between the common sense and tradition of benevolent neutrality, and the demands of a rule which seems to frustrate more than Establishment Clause objectives could reasonably require. Thus we

have witnessed the invalidation of such benign legislative accommodations as the loan of maps and the payment for costs of field trips to governmental and cultural centers. *Wolman* v. *Walter*, 433 U.S. 229, 248-55 (1977).

In *Walz* the Court noted that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. The presence of any of these elements raises a concern, as observed in *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971). However, whether a particular instance of aid must be nullified calls for a value judgment which must "turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz* v. *Tax Commission*, 397 U.S. at 669.

F. AN ENHANCED "PRIMARY EFFECT" COMPONENT

Of course, the objectives of the Establishment Clause must be scrupulously protected. The principle announced by the Chief Justice that "[a] law may be one 'respecting' the forbidden objective while falling short of its total realization" is a salutary one. *Lemon* v. *Kurtzman*, 403 U.S. at 612. However, it should not be applied on the basis of unfounded fears or suspicion,[47] for this leads inevitably to the frustration of reasonable government accommodation and *de facto* hostility.

The stigma which has attached to "aid" has not only led to the invalidation of benign laws enacted in the public interest, but it has generated the further constricting principle of sovereign surveillance as a condition to constitutional acceptance in some cases. *See, e.g., Lemon* v. *Kurtzman*, 403 U.S. at 619. The policing requirement conjoined to highly purgative standards

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[47] In *Allen* Justice Black dissented because he considered the legislation at issue the work of "powerful sectarian regligious propagandists . . . looking toward complete domination and supremacy of their particular brand of religion." 392 U.S. at 251. In *Walz*, Justice Douglas was apprehensive that tax exemption, though seemingly *de minimis*, was "a long step down the Establishment path." 397 U.S. at 716.

has caused the demise of socially useful legislation which does not pose the remotest threat to religious liberty as secured by the Establishment Clause. It is one thing to invalidate laws which actually tend to "advance" religion in the establishment or preferment sense. It is quite another to do so merely because the law, despite its legitimate objectives, also serves constitutional principles of parental choice. *See Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

The Court has made clear that the Establishment Clause does not preclude governmental assistance to church-sponsored activities which serve the public interest. *Tilton* v. *Richardson*, 403 U.S. at 679; *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). When the state respects the religious nature of its people and accommodates their spiritual needs, "it follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. at 314. The zone of impermissible government accommodation should not include laws that do not involve a concrete and intolerable risk of establishment or preferment, realistically viewed. The judicial inquiry should not stop at whether a statute benefits religion, but whether it "advances" it in the prohibited constitutional sense. The principles which determine the zone of impermissible governmental action should derive their content explicitly from the Establishment Clause objectives, as a means to those constitutional ends. This would provide the analytical framework for judging the constitutionality of a particular law by its actual propensity to subvert ultimate constitutional values.

In the end, the question is whether the state has exercised its constitutional power in a way that so trenches upon the Establishment Clause that it is necessary to defeat its legitimate objectives. *Cf. Everson* v. *Board of Education*, 330 U.S. at 16. The question is fundamentally the same under the Free Exercise Clause, and was stated thus in *Cantwell* v. *Connecticut*, 310 U.S. 286, 307 (1940):

> We must determine whether the alleged protection of the State's interest, means to which end would, in the absence

> of limitation by the federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

The state's interest in the education of its young is beyond serious question. It is also beyond dispute that the church-related schools of this nation serve the public interest in significant ways. *See Board of Education* v. *Allen*, 392 U.S. at 247-48; *Wolman* v. *Walter*, 433 U.S. at 262 (Powell, J., concurring).

Whether there is a concrete and intolerable risk of Establishment Clause evils is a function of contemporary circumstances. As Justice Powell observed in *Wolman*, 433 U.S. at 264:

> At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable *in light of the continuing oversight of this Court*. (Citation omitted.) (Emphasis added.)

As Justice Powell indicated, the Court is the ultimate security against establishment. The minute purgation of state legislation as a means to that end seems unnecessary in the absence of demonstrated mischief. Even before Justice Powell's sobering utterance, the Chief Justice counseled that limited aid for the benefit of school children "is not a step toward establishing a state religion—at least while this Court sits." *Meek* v. *Pittenger*, 421 U.S. 349, 387 (1975) (Burger, C. J., dissenting).

The vigilance of the Court should be sufficient consolation to all who treasure the religious liberty safeguarded by the Religion Clauses. Rooting the "primary effect" test more deeply in the soil of basic constitutional principle would provide a stability of course and analysis fully capable of culling laws which pose a concrete, intolerable risk of establishment evils. Society would be better served by destigmatizing "aid" under statutes

which, in truth, do no worse than lend a helping hand in simple justice to deserving people. Legislation which poses a significant danger can be dealt with in concrete circumstances, rather than avoided by a policy which fells the healthy tree to avoid the possibility of future disease.

This *amicus* does not propose a test, but rather an approach to guide decision. To do more would be presumptuous and unnecessary, particularly in a case which involves a statute which should *survive* the strictest demands of the decided cases.

II

THE MINNESOTA STATUTE THREATENS NO LEGITIMATE CONSTITUTIONAL VALUE, AND SATISFIES THE COURT'S THREE-PART TEST

The Court of Appeals properly concluded that the effects of the Minnesota statute are "quite far removed from those dangers which prompted inclusion of the Establishment Clause in the Bill of Rights." *Mueller* v. *Allen*, 676 F.2d at 1206.

As a matter of tax policy, Minnesota has simply elected to abstain from taxing the income of its citizens by providing a genuine deduction for educational expenses actually incurred by parents of all elementary and secondary school children. *Cf. Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. at 790 n.49. Tax deductions, like tax exemptions, do not involve a government subsidy through the transfer of public funds. *Cf. Walz* v. *Tax Commission*, 397 U.S. at 675. No taxpayer is compelled, through the use of tax funds, to contribute directly or indirectly to the support of religious activity in violation of the Establishment Clause. *Id.* at 667.[48]

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[48] It has been recognized that there is a qualitative difference between subsidies, where the state forcibly diverts the income of citizens to religious purposes, and tax exemptions where the state simply abstains from diverting to its own uses income independently generated by citizens or others. *Walz* v. *Tax Commission*, 397 U.S. at 690-91 (Brennan, J., concurring).

Unlike *Nyquist*, 413 U.S. at 793, the statute here does not single out a particular class of taxpayers for special treatment and is not intended to aid religious institutions. All parents are eligible for the deductions regardless of religious beliefs or the school attended by their children, public or private, church-related or not. Any benefits that may accrue to religious institutions under the Minnesota statute are indirect and remote, and certainly fall well within the principle of benevolent neutrality ammounced in *Walz*. 397 U.S. at 669, 676-77.

Measured both by reason and constitutional principle, this benign tax legislation is within the zone of permissible governmental discretion insofar as it includes taxpayers with childrer in church-related schools and poses no realistic threat to the religious liberty of any person. Applying the Three-Part Test, the purpose and primary effect of the Minnesota deductions are secular, *i.e.*, tax relief for parents, and are achieved without impermissible governmental involvement in religion.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Washington May the 15 1804

To the Soeur Therese de St. Xavier farjon Superior, and the Nuns of the order of St. Ursula at New Orleans.

I have recieved, holy sisters, the letter you have written me wherein you express anxiety for the property vested in your institution by the former governments of Louisiana. the [*sic*] principles of the constitution and government of the United States are a sure guarantee to you that it will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to it's [*sic*] own voluntary rules, without interference from the civil authority. whatever [*sic*] diversity of shade may appear in the religious opinions of our fellow citizens, the charitable objects of your institution cannot be indifferent to any; and it's [*sic*] furtherance of the wholesome purposes of society, by training up it's [*sic*] younger members in the way they should go, cannot fail to ensure it the patronage of the government it is under. be [*sic*] assured it will meet all the protection which my office can give it.

I salute you, holy sisters, with friendship and respect.

Th. Jefferson

Washington City Dec 25 1804

To the Soeur Therese de St. Xavier Forjon Superior, and the Nuns of the order of St. Ursula at New Orleans.

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I salute you, holy sisters, with friendship & respect.

Th: Jefferson

To Thomas Jefferson
President of the United States of America

Dear Sir:

The Ursuline Religious of New Orleans, encouraged by the honorable mention which you so kindly made of their order, take the liberty of having recourse to you in regard to some business which is of great concern to their Institute.

Although no express mention has been made of it, they think that the Treaty of Cession and still more the spirit of justice which characterizes the United States of America, will certainly guarantee to those seeking your help the continued enjoyment of their present property. But, keeping in mind that this same property is a sacred trust which has been confided to them, they believe that they would certainly fail in one of their principal obligations were they to neglect to see to it that this right to their property be put officially in writing, confirming their rights to this property not only for themselves but also for those of their Sisters who will succeed them; and, for this reason, to beg you, dear Sir, to present our petition to the Congress in the manner and form which you will judge the most suitable.

This request of the Ursulines of New Orleans is not dictated by personal interest nor ambitious aims. Separated from the world and its pomps and vanities, and, in a word, from all that is called its advantages, they have scarcely any ambition for earthly goods; but, bound by a solemn vow to use their time in the formation of youth, they cannot help but be anxious to know if they will be able with certainty to count on the continued enjoyment of their revenues which will enable them to fulfill their obligations. It is, then, less their own interests which they plead than it is that of the public good. In reality, it is the cause of the orphan and the abandoned child, of unfortunates brought up in the midst of the horrors of vice and infamy who come to be reared by us in the ways of Religion and virtue,

and be given a formation which will enable them one day to become happy and useful citizens. Finally, it is in the interest of this country which can but reap for itself honor and glory in encouraging and protecting an establishment as useful, and, we might even say, as necessary as ours. Dear Sir, we who seek your help dare to believe that these considerations will make an impression on you. Even more, we dare to count in advance on your protection.

We end by begging Heaven most fervently for your personal prosperity and for the happiness of the country whose great interests have been confided to you.

With the most profound respect, "Monsieur le President," we have the honor of being

Your very humble and very obedient servants

The Ursulines of New Orleans
Sr. Marie Therese Farjon of St. Xavier
Superior

March 21, 1804

Office-Supreme Court, U.S.
FILED
FEB 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-195

In the Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER AND JUNE NOYES, ET AL.,
PETITIONERS

v.

CLYDE E. ALLEN, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question:

Whether a Minnesota statute providing a state income tax deduction for tuition payments to both public and private elementary and secondary schools, as part of an overall scheme of deductions for a broad array of educational expenses, violates the Establishment Clause of the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-195

VAN D. MUELLER AND JUNE NOYES, ET AL., PETITIONERS

v.

CLYDE E. ALLEN, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a state statute providing a deduction for tuition payments to public and private elementary and secondary schools as part of a system of various types of state support for education. The Administration, as part of its overall program to improve the quality of education, supports federal legislation to provide tax relief for parents who choose nonpublic schools for their children. See Letter to the Speaker of the House and the President of the Senate Transmitting Proposed Legislation, 18 Weekly Comp. Pres. Doc. 828 (June 22, 1982). Such relief is the best means of "promot[ing] diversity in education and the freedom of individuals to take advantage of it, and to nurture the pluralism in American society which this diversity fosters" (*ibid.*). See also *Tuition Tax Credits: Hearings on S. 550 Before the Subcomm. on Taxation*

and Debt Management of the Senate Comm. on Finance, 97th Cong., 2d Sess., Pt. 2, 6 (1982) (statement of Terrell H. Bell). Tax relief is also important because the cost of both public and private education has risen dramatically in recent years. If nonpublic schools were no longer an available alternative, the resulting increase in public school attendance would impose significant new burdens on state and local taxpayers, and threaten the quality of education nationwide.

Since the Minnesota statute is similar to federal legislation proposed in the 97th Congress, and likely to be reintroduced in the 98th Congress, the United States has a strong interest in supporting its constitutionality.[1]

STATEMENT

1. Minn. Stat. Ann. § 290.09 (22) (West & Cum. Supp. 1982) authorizes a state income tax deduction for amounts paid for tuition, textbook, and transportation expenses incurred on behalf of children attending private or public elementary or secondary schools. Taxpayers may deduct only amounts actually spent, subject to certain maximums.[2] Deductible expenses must be incurred at schools that do not discriminate on the basis of race and that enable a Minnesota resident to fulfill

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[1] The United States filed amicus curiae briefs in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), and *Sloan* v. *Lemon*, 413 U.S. 825 (1973), at a time when earlier tuition tax relief bills were pending in Congress.

[2] The deduction is limited to actual expenditures up to $500 per dependent in kindergarten through sixth grade, and $700 per dependent in the seventh through twelfth grades.

state compulsory attendance laws.[3] The statute has been in existence largely unchanged since 1955.[4]

2. Petitioners, two Minnesota taxpayers, filed this action in a representative capacity against the Minnesota Commissioner of Revenue in the United States District Court for the District of Minnesota, seeking injunctive relief against enforcement of the statute.[5] They claimed that Minn. Stat. Ann. § 290.09

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[3] The district court found deductible tuition expenses to include (Pet. App. A-62 to A-64):

1. tuition in the ordinary sense;
2. tuition charged to students who attend public schools outside the districts where they reside;
3. certain summer school tuition;
4. tuition charged by a school for private tutoring services for slow learners;
5. tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes;
6. tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school;
7. Montessori School tuition for grades K through 12;
8. tuition for driver education when it is part of the curriculum.

[4] In 1976, the statute was amended to increase the maximum deductible amounts from $200 to $500 and $700 and to add the cost of textbooks as deductible expenses. 1976 Minn. Laws 93. In 1978, an amendment excluded deductions for certain extracurricular activities. 1978 Minn. Laws 1022.

In 1971, Minnesota enacted a statute that provided an income tax credit to parents who paid tuition and textbook expenses for their children attending nonpublic schools, and who did not claim a deduction under Minn. Stat. Ann. § 290.09 (22) (West Cum. Supp. 1982). 1971 Minn. Laws 1971. The tax credit provision was held unconstitutional on Establishment Clause grounds by the Supreme Court of Minnesota. *Minnesota Civil Liberties Union* v. *State*, 302 Minn. 216, 224 N.W.2d 344 (1974).

[5] Petitioners were joined as plaintiffs by three other individuals, whose claims were dismissed by the district court as res

(22) (West Cum. Supp. 1982) violates the Establishment Clause of the First Amendment. Two groups of taxpayers with children in nonpublic schools (both sectarian and nonsectarian) intervened as defendants. The district court held that the deduction has a secular purpose and effect (Pet. App. A-69 to A-78) and presents minimal danger of entangling the state in religious affairs (*id.* at A-78 to A-80). It accordingly granted the defendants' motion for summary judgment.

3. The court of appeals affirmed (Pet. App. A-1 to A-55). Applying the well-established test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the court "found no indicia of an invalid nonsecular purpose" (Pet. App. A-16). The court then turned to "the more difficult issue of whether the tuition deduction has the primary effect of advancing religion" (*id.* at A-36 to A-37). It concluded that Minnesota's deduction is different in significant respects from the form of aid held unconstitutional in *Committee For Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973) ("*Nyquist*").[6] The court noted that Minnesota's deduction is available to all parents, not just private school parents (Pet. App. A-44 to A-46). Parents of children in private nonsectarian schools constituted some 14% to 18% of the taxpayers qualifying for the deduction, and parents of children in public schools paid more than $2

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judicata (Pet. App. A-57 to A-58). The three dismissed plaintiffs were found to have had an interest in an earlier (nonrepresentative) taxpayer action challenging the same law. *Minnesota Civil Liberties Union* v. *Roemer*, 452 F. Supp. 1316 (D. Minn. 1978). In that case a three-judge court upheld the law against an Establishment Clause challenge.

[6] In *Nyquist*, this Court struck down a New York statute that offered a subsidy to low-income parents who sent their children to private schools, including sectarian schools, and a parallel tax credit in similar amounts for families with incomes between $5,000 and $25,000. See 413 U.S. at 764-766 & nn.18, 19.

million in tuition expenses in 1978-1979 (*id.* at A-45 to A-46). Moreover, unlike a "arbitrary" allowance or, in some cases, direct payment of the sort provided in *Nyquist*, the Minnesota tuition deduction operates more like the tax deduction afforded by federal law for charitable contributions (*id.* at A-46 to A-48). Thus, the court held that the Minnesota statute is similar to the laws upheld in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Everson* v. *Board of Education*, 330 U.S. 1 (1947), which provided textbooks and transportation to all school children, and to the tax exemption upheld in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), which extended benefits to a broad class of sectarian and nonsectarian institutions (Pet. App. A-40 to A-42).[7]

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[7] In *Walz*, a long-standing law providing an exemption from real estate taxes for property used for religious, educational, or charitable purposes was found not to violate the Establishment Clause.

The court of appeals also upheld provisions in the Minnesota law that allow deductions for transportation (see Pet. App. A-6 to A-7 n.3) and textbooks (*id.* at A-7 & n.4). Regarding the former, the court said that, given the approval of direct state payment for transportation in *Everson* v. *Board of Education*, *supra*, a deduction is a fortiori permissible (Pet. App. A-30 to A-31). For the same reason, the court concluded that a deduction for textbooks was authorized by *Board of Education* v. *Allen*, *supra* (Pet. App. A-31 to A-32). The court found slightly more difficult the statutory allowance of a deduction for instructional materials, which this Court has held cannot be loaned by the state to private schools either directly (*Meek* v. *Pittenger*, 421 U.S. 349, 362-366 (1975)) or through parents (*Wolman* v. *Walter*, 433 U.S. 229, 248-251 (1977)). It concluded, though, that any benefit to religion in this case was considerably more indirect, since what was at stake was a tax deduction for parents' purchases of nonreligious materials for use by their children at school (Pet. App. A-32 to A-35). The Question Presented in the petition does not expressly include a challenge to these portions of the court's opinion.

SUMMARY OF ARGUMENT

Minnesota has long provided a state income tax deduction for a broad array of educational expenses as part of an extensive system of state and local support for education. Viewed in this context, such a legislative scheme is consistent with the principle of neutrality that governs this Court's Establishment Clause jurisprudence. A legislative determination that money spent for such socially beneficial purposes should not count toward a family's tax liability is clearly permissible, and consistent with deductions provided for other types of socially useful expenditures. Notwithstanding clearly legitimate secular bases for legislation, however, a state's flexibility is necessarily circumscribed by the constitutional prohibition against the establishment of religion.

In assessing whether an otherwise neutral statute violates the Establishment Clause, this Court has considered whether the statute has a secular purpose; whether its primary effect is to advance religion; and whether it fosters an excessive entanglement of government with religion (*Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612-613). That the Minnesota statute has a secular purpose cannot be seriously challenged. *Nyquist*, *supra*, 413 U.S. at 773.

The Minnesota statute also does not have a primary effect of advancing religion. Unlike the New York statute invalidated in *Nyquist*, the tax benefit here is not in the form of, or a substitute for, a direct subsidy or reward for religious conduct. While it is true that a large portion of the tax benefits from the statute may flow to families with children in sectarian schools, percentages alone do not determine whether a law's primary effect is to advance religion. Also unlike *Nyquist*, the Minnesota law provides tax benefits to all parents, whether their children attend public or private school, for a broad array of educational expenses.

Finally, a tax deduction for parents with tuition expenses does not excessively entangle the government with religion.

ARGUMENT

MINNESOTA'S TUITION TAX DEDUCTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The task of this Court in accommodating "the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause" is "to define the boundaries of the neutral area between these two provisions within which the legislature may legitimately act." *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971) (plurality opinion). Clearly, the decisions of this Court "do not call for total separation between church and state; total separation is not possible * * *."[8] Thus, the separation between church and state, "far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614.

Application of the neutrality principle in the area of state assistance to nonpublic schools has been particularly difficult, resulting in "lines that often must seem arbitrary." *Wolman* v. *Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part). In *Nyquist* this Court said that the state must "maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." 413 U.S. at 788. The Minnesota deduction does not "advance" religion. It simply recognizes the costs borne by taxpayers who elect to provide their children what the basic public school system does not offer free of charge, and at-

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[8] *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614; *Roemer* v. *Board of Public Works*, 426 U.S. 736, 745-746 (1976); *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 669.

tempts to soften the impact of those costs. It falls well within the principle that "there is room for play in the joints productive of a benevolent neutrality * * *." *Walz* v. *Tax Commission, supra*, 397 U.S. at 669.

The Establishment Clause has been interpreted to permit many laws that provide indirect benefits to sectarian institutions,[9] but certain kinds of assistance are impermissible.[10] In distinguishing between them this Court has asked whether the statute has a secular purpose, whether its primary effect is to advance (or inhibit) religion, and whether it fosters an excessive government entanglement with religion.[11] But these "tests must not be viewed as setting the precise limits to the necessary constitutional inquiry[; they] serve only as guidelines * * *."[12]

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[9] See, *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 273 (1981); *Wolman* v. *Walter*, *supra*; *Roemer* v. *Board of Public Works*, *supra*; *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Tilton* v. *Richardson*, *supra*; *Walz* v. *Tax Commission*, *supra*; *Board of Education* v. *Allen*, *supra*; *Everson* v. *Board of Education*, *supra*.

[10] See, *e.g.*, *Meek* v. *Pittenger*, *supra*; *Nyquist*, *supra*; *Lemon* v. *Kurtzman*, *supra*.

[11] *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612-613; see also *Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 7. Some cases have also considered whether the challenged law creates the potential for political conflict along religious lines. See *Wolman* v. *Walter*, *supra*, 433 U.S. at 243 n.11; *Meek* v. *Pittenger*, *supra*, 421 U.S. at 372; *Nyquist*, *supra*, 413 U.S. at 794; *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 622-623.

[12] *Meek* v. *Pittenger*, *supra*, 421 U.S. at 359. See *Nyquist*, *supra*, 413 U.S. at 773 n.31, quoting *Tilton* v. *Richardson*, *supra*, 403 U.S. at 677-678 ("there is no single constitutional caliper that can be used to measure the precise degree" to which any of the Establishment Clause tests is applicable to a particular legislative enactment); *Wheeler* v. *Barrera*, 417 U.S. 402, 426 (1974).

A. The Minnesota Statute Has A Secular Purpose

It is by now well-established that the states have a legitimate secular interest in providing assistance to nonpublic schools.[13] Private schools, including religiously affiliated institutions, provide an education to state residents who would otherwise be entitled to attend public schools at local taxpayers' expense. *Hunt* v. *McNair*, 413 U.S. 734, 741-742 (1973). The states are legitimately concerned that their public school systems could become overburdened if substantial numbers of private school students were forced to enroll in public schools. *Nyquist*, *supra*, 413 U.S. at 773. Moreover, the welfare of all state residents is enhanced by state programs that endeavor to provide for all school children, including those attending nonpublic schools, "a fertile educational environment," *Wolman* v. *Walter*, *supra*, 433 U.S. at 236, and an "ample opportunity to develop to the fullest their intellectual capacities." *Meek* v. *Pittenger*, *supra*, 421 U.S. at 352 n.2. In addition, this Court has recognized the "propriety, and fully secular content," of a state's interest "in promoting pluralism and diversity among its public and nonpublic schools." *Nyquist*, *supra*, 413 U.S. at 773. See also *Roemer* v. *Board of Public Works*, *supra*, 426 U.S. at 754 (state statute "supporting private higher education generally, as an economic alternative to a wholly public system," has a secular purpose).

In *Nyquist* this Court was presented with one of numerous attempts by New York to provide direct benefits to parochial schools. See 124 Cong. Rec. 8708 (1978) (testimony of Professor Scalia). The Court nonetheless

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[13] See *Roemer* v. *Board of Public Works*, *supra*, 426 U.S. at 754; *Wolman* v. *Walter*, *supra*, 433 U.S. at 236; *Meek* v. *Pittenger*, *supra*, 421 U.S. at 363; *Hunt* v. *McNair*, *supra*, 413 U.S. at 741-742; *Nyquist*, *supra*, 413 U.S. at 773.

recognized that a state statute aiding nonpublic schools may have a secular purpose even if it has an impermissible "primary effect" of aiding religion. 413 U.S. at 773-774. See also *Meek* v. *Pittenger*, *supra*, 421 U.S. at 363. The court of appeals thus correctly rejected petitioners' argument that Minn. Stat. § 290.09(22) must necessarily have a nonsecular purpose if its effect is to aid families with children attending religious schools (see Pet. App. A-14). No other evidence of a constitutionally impermissible purpose has been adduced (see *id.* at A-69 to A-70).[14] Minnesota's statute reflects the State's intent to exempt from taxation that portion of all parents' income (below the deduction ceiling) devoted to the education of their children. As the court of appeals correctly recognized (*id.* at A-16):

> The manifest purpose of the * * * statute is to provide all taxpayers a benefit which will operate to enhance the quality of education in both public and private schools.

B. The Primary Effect of The Minnesota Statute is Neutral; it Does Not Advance Religion

The effects test, like the overall test of which it is a part, rests primarily on the requirement of governmental neutrality—the requirement that "no religion be ap-

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[14] If anything, Minn. Stat. § 290.09(22) evidences an intent to minimize whatever assistance, however indirect, the statute may provide to the religious function of private schools. The statute provides that parents may deduct the cost of textbooks used by their children only for subjects taught in public schools; the deduction "shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship" (*ibid.*). See *Wolman* v. *Walter*, *supra*, 433 U.S. at 236 n.5 (a statute's secular purpose is evidenced by provisions prohibiting use of services, materials, or equipment in religious courses or activities).

proved or favored, none commended, and none inhibited." *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 669. In determining the primary effect of a statute under the Establishment Clause, this Court has looked to a number of factors. The nature of the benefit, the character of the recipient, and the intimacy of the connection between the benefit and religious activity must all be taken into account. Also important is the breadth of the class benefited by the statute.

As the Eighth Circuit found in this case, the Minnesota statute in question is different from the New York statutory scheme in *Nyquist* in two significant respects. The Minnesota statute operates as a true deduction, unlike the tuition subsidy in *Nyquist*. Moreover, the statutory scheme here, unlike that in *Nyquist*, does not limit benefits to parents of private school children (Pet. App. A-41). Either of these distinctions should be sufficient to uphold the Minnesota statute.

1. *The Minnesota Tax Deduction Affords Only An Indirect And Insubstantial Benefit To Religion*

The benefit accruing to religious institutions from Minnesota's tax deduction is both indirect and insubstantial. It neither appropriates the income of taxpayers for religious functions, nor requires payments to religious institutions. Under these circumstances the law has no "direct and immediate effect of advancing religion," but "only a remote and incidental effect advantageous to religious institutions." *Nyquist*, *supra*, 413 U.S. at 784 n.39.

This Court has distinguished, for purposes of Establishment Clause analysis, between different forms of financial benefits to religious institutions. In *Walz* v. *Tax Commission*, *supra*, for example, the Court recognized that a tax exemption stood on a far different footing than a direct monetary subsidy from the state to churches. 397 U.S. at 675. "'[I]n the case of a direct

subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches'" (*id.* at 690-691) (Brennan, J., concurring). Tax exemptions, by contrast, involve no such diversion of resources; they "constitute mere passive state involvement with religion" (*ibid.*).[15]

The Court has also recognized that there is a distinction between providing benefits directly to religious institutions, and providing benefits to individuals, some of whom belong to such institutions. *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 621; *Meek* v. *Pittenger*, *supra*, 421 U.S. at 360-361 (opinion of Stewart, J.). Though not of decisive significance, see *Nyquist*, *supra*, 413 U.S. at 781, this factor must be considered for the obvious reason that the benefit may never be passed on to the religious institution or put to religious use. A tax deduction for parents whose child would attend a sectarian school in any event, for example, nei-

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[15] It appears from other contexts as well that this Court has not regarded tax exemptions (or deductions) and appropriations as fungible means of affording benefits to religious institutions. The impact of the former on federal taxpayers, for example, may be too insignificant to satisfy the constitutional requirements for standing. See *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968) (a federal taxpayer has standing to complain only of Congress's exercise of its "power under the *taxing and spending* clause of Art. I., § 8") (emphasis added); *ibid.* ("This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts"); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 480 n.17 (1982). Because the Establishment Clause rests in large part on a concern that citizens not be required to lend their support to religion, see *Everson* v. *Board of Education*, *supra*, 330 U.S. at 10-16, absence of the "injury in fact" required for constitutional standing would support the conclusion that the substantive requirements of the Clause are not violated when the government simply refrains from taxing.

ther encourages religious conduct nor increases the revenues of a religious institution.[16]

Moreover, far from encouraging religion the Minnesota deduction simply lessens the disparity between the burdens borne by two classes of state taxpayers. Like other states, Minnesota provides extensive support for a public school system which is properly, by constitutional guarantee, nonreligious. Viewed as one part of an overall effort to support education, the deduction promotes neutrality as between those who choose private and those who choose public education for their children.

Where grants have been provided directly to schools, this Court has been careful to require that no support go to their religious functions. But assistance in the form of transportation, books, and reimbursement for administration of tests may reduce costs, and thereby increase enrollment, without running afoul of the Establishment Clause. What is important is the intimacy of the nexus between state benefits and religious activity.

In the case of a tax deduction given to parents in general for education-related expenditures, the state's connection to religious activities at sectarian schools is too remote to violate the Establishment Clause. Unlike an

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[16] To say that such a deduction necessarily "rewards" religious conduct even though it does not affect the choice to engage in such conduct is to confuse the purpose and effect strands of the *Lemon* test. The Minnesota deduction does not necessarily reward religious conduct any more than a medical expense deduction rewards people for seeking medical services. The difference between the two kinds of deductions is that the former, unlike the latter, *would* be unconstitutional if the legislature's *motive* for enacting it were to favor religious taxpayers. As noted above, however, the Minnesota statute plainly has a secular purpose.

unrestricted grant to a sectarian school or to parents, here the taxpayer is simply relieved of the burden of paying some portion of taxes to the state. It is true that the tax deduction will offset to a degree money paid for tuition, and that tuition payments in turn may be viewed as funding in an undivided way both religious and secular functions of the school. But the same may be said of tax deductions for charitable contributions to churches (26 U.S.C. 170(a), (b)(1)(A)(i) and (ii)), since such contributions may be used to fund religious services, or the purchase of religious artifacts, or the publication of religious tracts.

Petitioners nevertheless contend (Pet. Br. 20-32) that Minnesota's deduction is unlike the exemption upheld in *Walz*, or the charitable deduction permitted by Section 170, and like the tax credit held invalid in *Nyquist*. Petitioners assert that the tax exemption in *Walz* was not a government subsidy to churches because the decision to exempt religious property was simply a byproduct of the "inevitable task of defining the tax base" (Pet. Br. 23 n.8). But by the same token, the exclusion of amounts paid for education can be seen as merely a byproduct of the inevitable task of defining taxable income. Minn. Stat. § 290.09(22) permits taxpayers to exclude a wide array of items—including business expenses, medical expenses, and alimony—in addition to educational expenses. The deduction of these items from taxable income is no more a subsidy to businesses, doctors, former spouses, or schools, than the exemption of property owned by religious organizations from the tax base in *Walz* was a subsidy to churches.

Nor is petitioners' purported distinction of Section 170 any more convincing. They argue that Section 170 allows a deduction for "voluntary contributions," made from "detached and disinterested generosity" (Pet. Br. 23), whereas § 290.09 involves "the deductibility of * * * user fees paid by a taxpayer in return for a

specified service" (Pet. Br. 13). The latter, they claim, is a "direct government subsidy" because the taxpayer—who receives both the service and a deduction—ends up in an "economically positive position in connection with the entire transaction." By contrast, the Section 170 taxpayer, who receives no quid pro quo, "remains in an economically negative position" even after the deduction (Pet. Br. 27 n.11). But the suggested distinction is irrelevant for Establishment Clause purposes. If the Clause forbids the government to encourage religious activity by the *taxpayer*, the encouragement offered by the government in the two cases is identical: assuming equal tax rates, the government foregoes collection of the same amount of money from one who pays $500 in tuition as it does from one who makes a $500 charitable contribution.[17] On the other hand, if the clause is concerned about the effect of government conduct on religious *institutions*, the deduction given in Section 170 may actually provide a more objectionable form of aid. If one focuses (as petitioners do) on the balance sheet, the institution receiving a charitable contribution ends up in an "economically positive position" because it need not provide services in exchange for the contribution.[18]

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[17] If the distinction offered by petitioners is meant to suggest that government encouragement will more likely be *effective* in the case of a "user fee" (because the taxpayer already has an economic incentive to engage in the favored transaction), it ignores the obvious fact that people act from noneconomic motives as well. Indeed, it is likely that those who seek religious education for their children are actuated by noneconomic motives in much the same way as are those who make charitable contributions to religious organizations.

[18] Petitioners also suggest that the Minnesota deduction, unlike a "genuine tax deduction" (Pet. Br. 30), is available only for a "narrowly defined activity" (*id.* at 23, 24, 25), and only to a narrow group of claimants (*id.* at 30). But a deduction for theft losses (see Pet. Br. App. A, Schedule A) is none the less "gen-

Finally, contrary to petitioners' contention, the Minnesota statute is different in significant ways from the New York law held invalid in *Nyquist*. One aspect of the scheme devised by New York was a provision for the direct appropriation to low income families of an amount of money unrelated to actual tuition expenses. Interlocked with that was a graduated system of tax relief

> unrelated to the amount of money actually expended by any parent on tuition * * *. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. * * * The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State.

413 U.S. at 790-791. Under these circumstances the Court concluded that—although the law might have secular purposes as well (*id.* at 773)—New York had acted from a desire to "reward [a parent] for sending his children to nonpublic schools" (*id.* at 791). The statute had both the "*purpose* and inevitable effect * * * to aid and advance those religious institutions" (*id.* at 793; emphasis added).[19]

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uine" for being available only in narrow circumstances. The relevant question for Establishment Clause purposes is not *how many kinds* of activities are deductible on a particular line of an income tax return, but whether the deductions allowed have a secular purpose and effect. It is true that the availability of any particular deduction to both religious and nonreligious taxpayers provides assurance that those requirements are satisfied, but as we argue below, pages 18-22, the Minnesota statute affords that assurance.

[19] See also 413 U.S. at 791 ("'the money involved represents a charge made upon the state for the *purpose* of religious educa-

This case, by contrast, presents the kind of tax deduction whose acceptability *Nyquist* declined to decide (413 U.S. at 790 n.49). Section 290.09 permits taxpayers to deduct from gross income the amount actually expended for tuition. The education deduction functions in precisely the same way as deductions for business expenses, medical expenses, political and charitable contributions, home mortgage interest payments, and so on. It does not afford a "predetermined amount of tax 'forgiveness' in exchange for performing a specific act which the State desires to encourage" (413 U.S. at 789). It simply represents a judgment by the state that income devoted to any educational expense—including tuition payments to public schools for special programs, to private secular schools, and to private sectarian schools—should not be subjected to the burden of taxation.[20]

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tion'") (emphasis added); *id.* at 793 (unlike New York's tuition tax relief, the aid in *Walz* was not a product "of any *purpose* to support or to subsidize") (emphasis added).

[20] Petitioners also rely (Pet. Br. 26) on several cases summarily affirmed by this Court for the proposition that deductions for "user fees" inevitably act as government subsidies for religious activities. In one of those cases, *Kosydar* v. *Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972), aff'd mem., 413 U.S. 901 (1973), the state provided a dollar-for-dollar tax "credit" for nonpublic school parents and a narrow class of other claimants. 353 F. Supp. at 750, 760. If the total "credit" to which a parent was entitled exceeded his income tax liability, the statute provided a refund to the taxpayer, payable out of a special fund and capped by the sum of the sales, excise, and property taxes paid during the tax year (*id.* at 750). The law was thus identical in effect to the New York statute addressed in *Nyquist*—both involved a combination reimbursement/credit scheme designed to give "each family * * * a carefully estimated net benefit * * *." *Nyquist, supra*, 413 U.S. at 790.

In *Public Funds for Public Schools* v. *Byrne*, 590 F.2d 514 (3d Cir.), aff'd mem., 442 U.S. 907 (1979), the state provided a $1000 tax exemption only to parents of children in private school, and regardless of actual expenditures. 590 F.2d at 516.

2. *The Minnesota Statute Benefits A Broad Class*

"The provision of benefits to [a] broad * * * spectrum of groups is an important index of secular effect." *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981). This Court has held that among the kinds of benefits that may be allowed indirectly to accrue to sectarian schools are the provision of transportation to and from school, and the furnishing of textbooks, for all students. *Everson* v. *Board of Education*, *supra*; *Board of Education* v. *Allen*, *supra*. "In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." *Nyquist*, *supra*, 413 U.S. at 782 n.38 (emphasis in original). See also *Tilton* v. *Richardson*, *supra*; *Walz* v. *Tax Commission*, *supra*; *Nyquist*, *supra*, 413 U.S. at 782 n.38. In striking down tuition grants made available by New York only to children attending private schools, the Court in *Nyquist* left open the question "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e.g.* scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" (*id.* at 783 n.38).[21]

Minn. Stat. § 290.09(22) is quite different from the state aid held invalid in *Nyquist*. Minnesota's tax provision allows a deduction for the educational expenses of

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Thus, not only was the tax relief available—unlike Minnesota's—only to a narrow class, but it could in theory result in a tax saving exceeding a taxpayer's expenditures for parochial school.

[21] In defining the breadth of the class benefited, the Court should also consider the larger context in which a particular form of public assistance plays a role. Federal tax relief for tuition payments, for example, would be merely one strand in a larger complex of programs designed to enhance the quality of public and nonpublic education alike.

all families with children in elementary and secondary school, whether public or nonpublic. While it is true that children attending public schools do not commonly pay tuition in the ordinary sense, they may do so if they attend school outside the district of their residence. More typically, public school students are faced with tuition charges for summer school, or tutoring services provided by the school, or such courses as driver education that may be included in the curriculum (Pet. App. A-62 to A-64). While the record does not reveal the number of taxpayers claiming such deductions, there is no reason to assume that it is small.[22] The statute is thus neutral in that it provides a deduction (up to the amount of the statutory ceiling) for all the expenses of educational instruction that parents may incur, whether their children attend public school, private secular school, or private sectarian school.

Petitioners nevertheless contend that the Minnesota statute is unconstitutional because "the overwhelming bulk of the benefits" accrues to parents with children in sectarian schools (Pet. Br. 37).[23] At the very least, they

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[22] We are informed by the State of Minnesota that deductions were claimed on behalf of 204,670 dependents on 1980 returns. (The number of nonpublic school students in 1979-1980 was 90,954. J.A. A33.) Nearly half of the deductions were in amounts of $200 or less. The state does not break deductions down among tuition, books, and transportation.

[23] The cases relied upon by petitioners in support of this proposition (Pet. Br. 40-41) are inapposite. Most of those cases involved benefits, usually in the form of direct cash grants, made available only to parents of children in nonpublic schools. *Public Funds for Public Schools* v. *Byrne*, *supra*, 590 F.2d at 516 ($1000 exemption for parents of nonpublic school children); *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, 31 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974) (grants of $10-$20 to parents of nonpublic school children); *Sloan* v. *Lemon*, *supra*, 413 U.S. at 828-829 (grants of $75-$150 to parents of nonpublic school children); *Nyquist*, *supra*, 413 U.S. at 764-767

argue, the available statistics amount to a prima facie case that deductions are disproportionately available to such parents, and the State bears the burden of producing contrary evidence and persuading the court of its accuracy (*id.* at 36-50). It is erroneous, however, to suppose that an Establishment Clause violation can be deduced simply from the kind of statistical computations advanced by petitioners, even if they are accurate. More than half of the charitable deductions taken under Section 170 of the Internal Revenue Code of 1954 (26 U.S.C.) are for contributions to churches, Andrews, *Personal Deductions in an Ideal Income Tax*, 86 Harv. L. Rev. 309, 356 & n.79 (1972), yet this Court in *Nyquist* specifically left open the question whether that and similar deductions were consistent with the Establishment Clause "under the 'neutrality' test in *Walz*." *Nyquist*, *supra*, 413 U.S. at 790 n.49.

(grants of $50-$100 and parallel tax credits for parents of nonpublic school children). Cf. *Kosydar* v. *Wolman*, *supra*, 353 F. Supp. at 750, 760 (credit/reimbursement scheme for parents of nonpublic school children and a narrow class of public school parents); *United Americans for Public Schools* v. *Franchise Tax Board*, No. C-73-0090 (N.D. Cal.), aff'd mem., 419 U.S. 890 (1974) (credit of $125 for parents of nonpublic school children).

The remaining cases involved direct payments to nonpublic schools themselves for services or materials that, though available in public schools as well, would inevitably be intertwined with the religious mission of parochial schools. *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479-480 (1973) (reimbursement of nonpublic schools for test administration, etc.); *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 607-610 (salary supplements for nonpublic school teachers, payments to schools for performance of secular services). Cf. *Wolman* v. *Walter*, *supra*, 433 U.S. at 250-255 (grant in kind of materials, provision of field trips, to children in nonpublic schools).

Neither the percentage[24] nor the dollar amount of benefits[25] should be a shibboleth for identifying Establishment Clause violations. As the court of appeals noted, it would be difficult to justify a rule that would hold "the same statute * * * constitutional one year, and not the next, or in one state and not in another, depending upon the current statistical breakdown of sectarian and nonsectarian schools" (Pet. App. A-30 n.13). Rather, the "primary effect" test in *Lemon* was designed to accommodate all laws that achieve secular effects—even in a religious context—provided the attendant benefit to religion is incidental and indirect. See *Nyquist*, *supra*, 413 U.S. at 783-785 n.39. Regardless of the percentage distribution or dollar amount, the provision of benefits to a broad class affords significant assurance that any aid to religion is not only indirect (see pages 11-17, *supra*) but also an incidental byproduct of a secular legislative program. In the first place, the breadth of the class guarantees that the statutory effect is in fact secular, because it occurs outside as well as within a religious context. Here, as the court of appeals concluded (Pet. App. A-52),

> the State, in effect, abstains from taxing that income which has been denoted by a broad class of Minnesota citizens to their children's education. In so doing, the State has adopted a policy which is neutral toward religion * * *.

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[24] In *Nyquist* the Court refrained from "intimating whether this factor alone might have controlling significance * * *." 413 U.S. at 794.

[25] In *Wolman* v. *Walter*, *supra*, 433 U.S. at 233, the biennial appropriation for nonpublic school aid under a state statute sustained in large part by this Court was $88 million. Petitioners have estimated that the deductions taken under Minn. Stat. § 290.09(22) result in a revenue loss of approximately $2.4 million (Pet. App. A-18).

Moreover, inclusion of the religious within a broad class of statutory beneficiaries guarantees that they receive no advantage relative to secular recipients. Indeed, to exclude those acting on religious principles from enjoyment of benefits otherwise broadly available could violate the Free Exercise Clause.[26] That the average deduction claimed by parents of children attending sectarian schools may exceed the average deduction claimed by parents of public school children does not undermine this point. Taxpayers are treated neutrally by the statute in the sense that each may claim a deduction for all tuition expenses up to the ceiling of $500 or $700. The decision to spend more or less on education rests with the taxpayer, and the option of spending more is made no more attractive for the religious than it is for the nonreligious. It is true that religious parents may choose private school in disproportionate numbers; but the choice results from religious impulse, and not from any relative advantage afforded them by the law.[27]

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[26] *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Everson* v. *Board of Education*, *supra*, 330 U.S. at 16 ("New Jersey * * * cannot exclude * * * members of any * * * faith, *because of their faith*, * * * from receiving the benefits of public welfare legislation") (emphasis in original). But cf. *Sloan* v. *Lemon*, *supra*, 413 U.S. at 834 (equal protection).

[27] It is of course true that the choice to attend a sectarian school is made easier by the deduction, just as it is by state-supplied books or transportation. The point made in text is simply that a law does not confer a *relative* advantage on religion simply because religious parents claim its benefits in greater numbers. Such a law is thus consistent with "the 'neutrality' test in *Walz*." *Nyquist*, *supra*, 413 U.S. at 790 n.49.

C. The Minnesota Statute Does Not Foster Excessive Government Entanglement With Religion

In order for a statute to survive an Establishment Clause challenge, it must not involve "an excessive government entanglement with religion." *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 674. See *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 612-613. The tax deduction provided by Minnesota involves no such entanglement.[28]

Minn. Stat. § 290.09(22) creates no administrative relationship between government and religion. The statute provides that families with children attending nonprofit schools, which meet Minnesota's educational requirements and do not discriminate on the basis of race, may deduct their educational expenses. Thus, the only interaction between the State and schools themselves is what is necessary to determine compliance with educational, nonprofit, and nondiscrimination requirements[29]—a level of involvement long recognized

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[28] In *Nyquist*, the Court did not reach the question whether the tuition grant and tax relief provisions of New York's statute would result in an unacceptable entanglement of the state with religion. 413 U.S. at 794.

[29] Closer state scrutiny may be necessary to enforce the requirement that no deduction be taken for "instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship * * *." Minn. Stat. § 290.09(22). But the determination of such questions in the course of individual audits is not the kind of "comprehensive, discriminating, and continuing state surveillance" of religion that *Lemon* found objectionable. 403 U.S. at 619. And in any event, such a decision is not significantly different from the determination—required by the New York law upheld in *Walz* (397 U.S. at 667 n.1)—that property be "used exclusively for carrying out" exempt purposes.

as proper. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). So long as those demands are met, interaction between the State and the individual taxpayer in the course of an audit would be limited to verification of tuition expenses. That differs in no way from the government's involvement with religion occasioned by the review of charitable contributions under 26 U.S.C. 170. As the court of appeals correctly recognized, such "'church-state contacts occasioned by normal tax administration procedures do not give rise to excessive and unconstitutional government and religion entanglements. *See Walz*, 397 U.S. at 674-76'" (Pet. App. A-35 to A-36).[30]

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[30] In addition to the three-part test developed in *Lemon* v. *Kurtzman*, *supra*, the Court has in some cases asked whether a statute challenged under the Establishment Clause has the potential to create political fragmentation along religious lines. It is doubtful whether that potential, though it may serve as a "warning signal," suffices to invalidate a statute otherwise constitutional. *Nyquist*, *supra*, 413 U.S. at 797-798. In any event, the concern has properly been limited to statutes of the type considered in *Lemon*, which require annual appropriations. *Committee For Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 661 n.8 (1980).

Minnesota's law, unlike the grants in *Lemon* and the credit (linked to grants) in *Nyquist*, provides a self-executing deduction program requiring no further action by the legislature. Cf. *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 698-699 (opinion of Harlan, J.) Moreover, the fact that Minnesota's statute extends benefits to all families with children in school, whether public or nonpublic, decreases any likelihood of conflict along religious lines. See *Nyquist*, *supra*, 413 U.S. at 794 ("in terms of the potential divisiveness * * * the narrowness of the benefited class would be an important factor").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1983

No. 82-195-CFX
Status: GRANTED

Title: Van D. Mueller and June Noyes, Petitioners
v.
Clyde E. Allen, Jr., et al.

Docketed:
July 29, 1982

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Kampf, William I.

Counsel for respondent: Blomgren, Douglas C., Kenefick, John P., Quinn, Timothy P.

Entry	Date	Note	Proceedings and Orders
1	Jul 29 1982	G	Petition for writ of certiorari filed.
2	Sep 2 1982		Brief of respondent Dennis J. Berthiaume, et al. in opposition filed.
3	Sep 2 1982		Brief of respondent Clyde E. Allen, MN Commr. of R in opposition filed.
4	Sep 4 1982		Brief of respondents Brenda B. Becker, et al. in opposition filed.
5	Sep 7 1982		DISTRIBUTED. September 27, 1982
6	Oct 4 1982		Petition GRANTED.
			**********
7	Nov 3 1982		Order extending time to file joint appendix and petitioners' brief on the merits until December 9, 1982.
8	Nov 14 1982	G	Motion of Minnesota Association of School Administrators, et al. for leave to file a brief as amici curiae filed.
9	Nov 29 1982		Motion of Minnesota Association of School Administrators, et al. for leave to file a brief as amici curiae GRANTED.
10	Dec 3 1982	G	Motion of United Americans for Public Schools for leave to file a brief as amicus curiae filed.
11	Dec 9 1982	G	Motion of Baptist Joint Committee on Public Affairs for leave to file a brief as amicus curiae filed.
12	Dec 9 1982	G	Motion of Americans United for Separation of Church and State for leave to file a brief as amicus curiae filed.
13	Dec 9 1982	G	Motion of National School Boards Association for leave to file a brief as amicus curiae filed.
14	Dec 10 1982		Joint appendix filed.
15	Dec 10 1982		Brief of petitioners Van D. Mueller, et al filed.
16	Dec 9 1982	G	Motion of National Committee for Public Education and Religious Liberty, et al. for leave to file a brief as amici curiae filed.
17	Dec 13 1982		Motion of United Americans for Public Schools for leave to file a brief as amicus curiae GRANTED.
18	Jan 10 1983		Motion of Baptist Joint Committee on Public Affairs for leave to file a brief as amicus curiae GRANTED.
19	Jan 10 1983		Motion of Americans United for Separation of Church and State for leave to file a brief as amicus curiae GRANTED.
20	Jan 10 1983		Motion of National School Boards Association for leave to file a brief as amicus curiae GRANTED.
21	Jan 10 1983		Motion of National Committee for Public Education and

No. 82-195-CFX

Entry	Date	Note	Proceedings and Orders
			Religious GRANTED. for leave to file a brief as amicus curiae.
22	Jan 7 1983	D	Motion of respondents for divided argument filed.
23	Jan 8 1983	G	Motion of Mountain States Legal Foundation, et al. for leave to file a brief as amici curiae filed.
25	Jan 5 1983		Order extending time to file brief of respondent on the merits until February 2, 1983.
26	Jan 17 1983		Motion of respondents for divided argument DENIED.
27	Jan 17 1983		Motion of Mountain States Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
28	Jan 20 1983		Brief of respondent Clyde E. Allen, MN Commr. of R filed.
29	Jan 27 1983	G	Motion of Citizens for Educational Freedom for leave to file a brief as amicus curiae filed.
30	Jan 31 1983	G	Motion of Catholic League for Religious and Civil Rights for leave to file a brief as amicus curiae filed.
31	Feb 1 1983	G	Motion of United States Catholic Conference for leave to file a brief as amicus curiae filed.
32	Feb 2 1983		Brief of respondent Dennis J. Berthiaume, et al. filed.
33	Feb 2 1983	G	Motion of Parents Rights, Inc. for leave to file a brief as amicus curiae filed.
34	Feb 2 1983		Brief amicus curiae of United States filed.
35	Feb 3 1983	G	Motion of Council for American Private Education, et al. for leave to file a brief as amici curiae filed.
36	Feb 3 1983		Brief of respondents Interv., Brenda Becker, et al. filed.
37	Feb 3 1983	G	Motion of National Jewish Commission on Law and Public Affairs for leave to file a brief as amicus curiae filed.
38	Feb 22 1983		Motion of Citizens for Educational Freedom for leave to file a brief as amicus curiae GRANTED.
39	Feb 22 1983		Motion of Catholic League for Religious and Civil Rights for leave to file a brief as amicus curiae GRANTED.
40	Feb 22 1983		Motion of United States Catholic Conference for leave to file a brief as amicus curiae GRANTED.
41	Feb 22 1983		Motion of Parents Rights, Inc. for leave to file a brief as amicus curiae GRANTED.
42	Feb 22 1983		Motion of Council for American Private Education, et al. for leave to file a brief as amici curiae GRANTED.
43	Feb 22 1983		Motion of National Jewish Commission on Law and Public Affairs for leave to file a brief as amicus curiae GRANTED.
44	Feb 19 1983		Record filed.
45	Feb 19 1983		Certified original record & C.A. proceedings, 2 volumes received.
46	Mar 11 1983		CIRCULATED.
47	Mar 24 1983		SET FOR ARGUMENT. Monday, April 18, 1983. (3rd case) 1 hour
48	Apr 11 1983	X	Reply brief of petitioner Van D. Mueller, et al filed.
49	Apr 18 1983		ARGUED.